Office Supreme Court U.S.
FILED
OCT 5 1900
JAMES H. McKENNEY,
Clerk.

25571

No. 258.

By of Schnuermacher, Noble, Shields & Reynolds for P. C.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 258.

Filed Oct. 5, 1900.

ISAAC M. MASON, AUDITOR OF THE CITY OF ST. LOUIS, MISSOURI,
Plaintiff in Error.

vs.

THE STATE OF MISSOURI *ex rel.* JAMES McCAFFREY, LAWRENCE D. KINGSLAND AND GEORGE J. KOBUSH, RELATORS,
Defendants in Error.

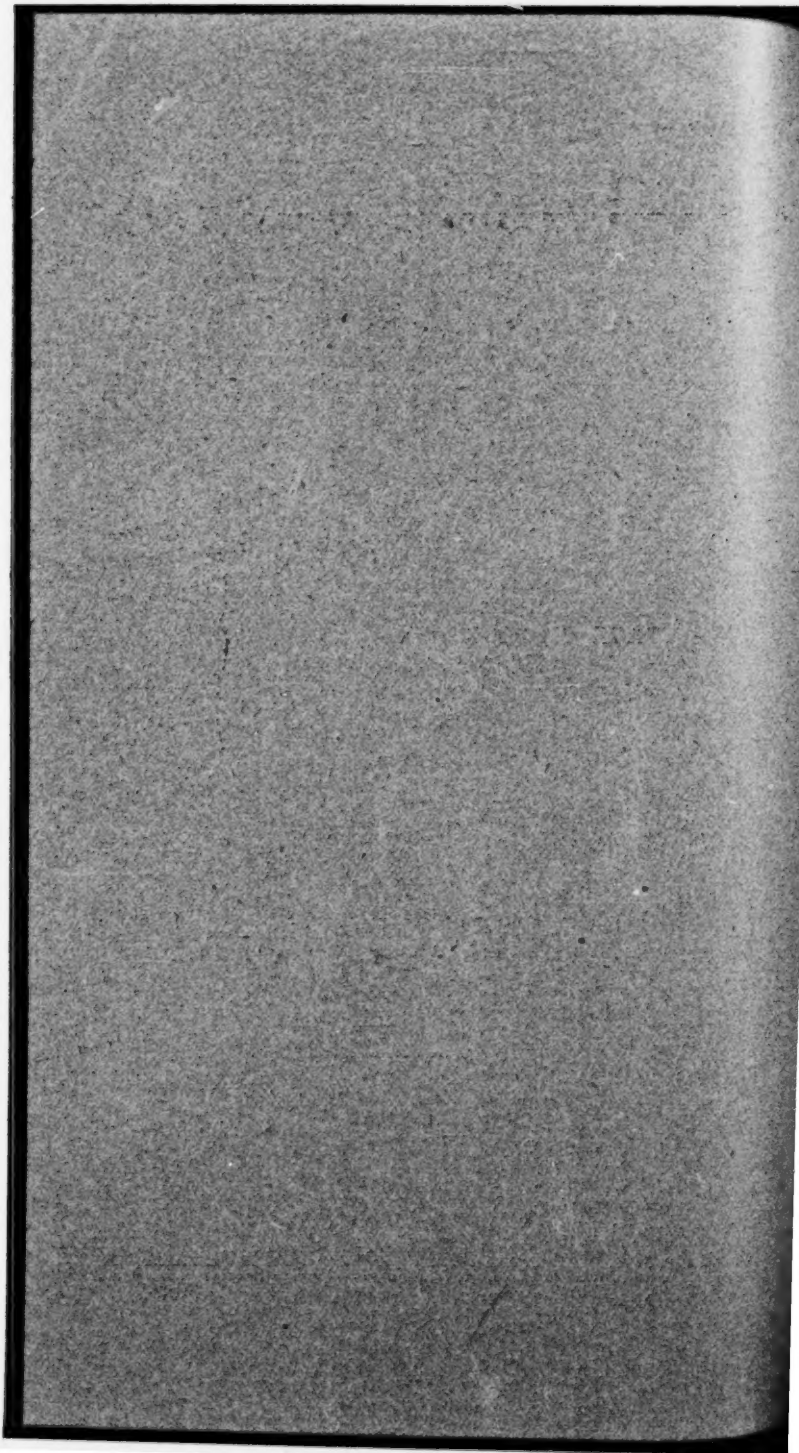
IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

ABSTRACT AND STATEMENT OF THE CASE, ASSIGNMENT OF ERRORS, AND BRIEF OF THE ARGUMENT FOR PLAINTIFF IN ERROR, WITH PRAYER FOR REVERSAL.

BEN. SCHNURMACHER,
City Counselor.

JOHN W. NOBLE,
GEO. H. SHIELDS,
GEO. D. REYNOLDS.
Of Counsel, for Plaintiff in Error.

St. Louis Law Printing Co., 311-315 Locust St. Phone: Main 1819A



25572

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 258.

ISAAC M. MASON, AUDITOR OF THE CITY OF ST. LOUIS, MISSOURI,
Plaintiff in Error,

vs.

THE STATE OF MISSOURI *ex rel.* JAMES McCAFFERY, LAWRENCE D. KINGSLAND AND GEORGE J. KOBUSH, RELATORS,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

ABSTRACT AND STATEMENT OF THE CASE FOR PLAINTIFF IN ERROR.

It is ordained by Section 5, Article 8, of the existing Constitution of Missouri, adopted in 1875, that "The General Assembly shall provide by law for the registration of all voters in cities and counties having a population of more than 100,000 inhabitants, and may provide for such registration in cities having a population exceeding 25,000 inhabitants, and not exceeding 100,000, but not otherwise."

The same Constitution authorizes any city having a population of more than 100,000 inhabitants to frame a charter for its own government (Article IX., Section 16), and section 20 of the same Article specifically authorizes the City of St. Louis to frame and adopt a charter, for its own government "in harmony with and subject to the Constitution and Laws of Missouri." Section 22 ordains that such charter so adopted may be amended at intervals of not less than two years, by proposals therefor made by the law-making authorities of such city, and accepted by three-fifths of the qualified voters thereof voting at a general or special election; but such charter and amendments (Section 23) shall always be in harmony with and subject to the Constitution and Laws of Missouri.

Section 23 also ordains that the City of St. Louis "shall * * * perform all other functions in relation to the State, in the same manner as if it were a county, as in this Constitution defined."

Section 25 ordains that "Notwithstanding the provisions of this Article, the General Assembly shall have the same power over the City and County of St. Louis as it has over other cities and counties of this State."

Section 7 of Article IX. of the same Constitution ordains that "The General Assembly shall provide by general law for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the power of each class shall be defined by general law, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions."

Under the provisions of the last named section, the General Assembly, at its first session after the adoption of the Constitution, provided by a general law, that all cities and towns in this State containing 100,000 inhabitants or more should be cities of the first class; all cities and towns containing 30,000, and less than 100,000, should be

cities of the **second** class; all cities and towns containing 3,000 and less than 30,000, should be cities of the **third** class; all cities and towns in the State containing 500 and less than 3,000 inhabitants, and all towns existing under any special law, having less than 500 inhabitants, should be cities of the **fourth** class. That provision for the classification of cities has remained a law ever since and is embodied in the Revised Statutes of the State. (Revision of 1899, as Sections 5252, 5253, 5254 and 5255.)

It is also ordained by Section 53 of Article IV. of the Constitution, that "The General Assembly shall not pass any local or special law * * * (2) regulating the affairs of counties, cities, townships, wards or school districts; * * * (11) for the opening and conducting of elections, or fixing or changing the places of voting; * * * (14) creating offices or prescribing the powers and duties of officers in counties, cities, townships, wards or school districts; * * * (32) In all other cases, where a general law can be made applicable, no local or special law shall be enacted; and whether a general law could have been made applicable in any case, is hereby declared a judicial question, and as such shall be judically determined without regard to any legislative assertion on that subject; nor shall the General Assembly indirectly enact such special or local law by the partial repeal of a general law, but laws repealing local or special acts may be passed."

By Section 54 of the same Article it is ordained that: "No local or special law shall be passed unless notice of the intention to apply therefore shall have been published in the locality where the matter or thing to be affected may be situated. * * * The evidence of such notice having been published shall be exhibited in the General Assembly before such Act shall be passed, and the notice shall be recited in the Act according to its tenor."

The citizens of St. Louis, under the provisions of Sec-

tion 20 of Article IX. of the Constitution, above quoted, adopted a Charter in 1875 which, among other things, provided for registration and elections in that City. Registration and elections were there conducted under these Charter Provisions until 1883 when, by Act of March 31, 1883 (Laws 1883, page 38), the General Assembly passed an Act "For the registration of all voters in cities having a population of more than 100,000 inhabitants and to govern elections in such cities and to create the office of Recorder of Voters." This Act was attacked as unconstitutional because special, as relating solely to St. Louis, it then being the only city in the State with 100,000 inhabitants and over, and because embracing in its title and the body of the Act more than one subject, namely: registration and elections.

In the case of Ewing vs. Hoblitzelle, 85 Mo. 64, decided in October, 1884, the Supreme Court of the State declared this Act of 1883 constitutional, holding that as it applied to all cities then having or which thereafter should have over 100,000 inhabitants, it was but carrying out the mandatory provisions of Section 5 of Article VIII. of the Constitution.

This registration and election act of 1883 remained substantially the law of the State, governing registration and elections in cities containing 100,000 inhabitants and over, down to May 31, 1895. In the meantime Kansas City had acquired a population of over 100,000, and in the case of State *ex rel.* Attorney General vs. Dolan, 93 Mo. 467, decided in 1887, the Supreme Court held that the Act also extended over that city—the Courts in Missouri (see case last cited) taking judicial notice of the population of the cities of the State. These two cities, St. Louis and Kansas City, are the only ones in the State having more than 100,000 inhabitants, in which the law of 1895 has heretofore been operative, the former having about 575,000, the latter about 165,000. The Census Bureau has, however, recently announced the population of St. Joseph at 102,979; so that now the latter city is also to be classed in the cities of the first class, having over 100,000 inhabitants, and Spring-

field, Sedalia, and Hannibal, next in rank, having from 20,000 to 25,000 inhabitants. St. Louis is the only city in the State having over 300,000 inhabitants.

At a special session of the General Assembly, called for considering that matter along with two others, an act was passed, which was approved May 31, 1895, repealing this act of 1883 and its amendments, and enacting a new law governing registration and elections in cities "now having or which hereafter may have over 100,000 inhabitants." This act will be found bound with and at the end of the Session Acts of 1895. As subsequently amended it appears in Volume 2 of the Revised Statutes of Missouri for 1899, pages 1699 to 1736, both inclusive, Sections 7271 to 7360, both inclusive, being entitled "Article IX., Registration and Elections in Cities with 100,000 Inhabitants or Over." Down to August 20, 1899, it was in force without question in St. Louis and Kansas City.

At the regular session of the General Assembly of 1899, the Fortieth General Assembly, by act approved June 19, 1899, which act is called the "Cardwell law" (see Session Acts 1899, page 197), this act of May 31, 1895, was amended in two sections; namely, in Sections 2 and 91, of the original act, so as to make them as they now appear in Sections 7271 and 7360 of the Revised Statutes of 1899; the latter section relating simply to the pay of the various officers. Section 2 of the act of 1895, as amended by the "Cardwell law", is now Section 7271, and provides for the appointment of all three of the Election Commissioners by the Governor; whereas, as it was originally enacted, the Governor appointed two of them and the Mayor of the city appointed the third.

At this same session Representative Nesbit, a member of the House of Representatives of the Fortieth General Assembly, introduced a bill in that House under the following title: "An act to provide for the registration of voters in cities now having or which hereafter may

have 300,000 inhabitants or more; to create the office of Election Commissioner, provide for his appointment and define his duties; to govern elections in such cities, defining offenses and providing penalties therefor; and to prescribe rules and regulations governing registration and elections therein."

This is the same bill introduced in evidence by Plaintiff in Error and marked "Respondents' Exhibit A," being House bill No. 760, as printed by order of the House (Transcript, page 35), and is copied in full in the Transcript at pages 62 to 81. It will be noticed that this bill provided for the appointment of **one** Election Commissioner for any city now or hereafter having over 300,000 inhabitants, and was framed throughout on a plan which put the whole control of registration and elections in each of such cities in this one Election Commissioner. This bill (House Journal, Transcript pages 37, and 145 to 149, "Respondents' Exhibit D"), went to engrossment in the House under the above title, but before being engrossed it was amended by striking out all of the bill after its enacting clause and inserting practically a new bill. It will also be noted that while the bill as engrossed contains the title of the bill as introduced, namely: "An act to provide, etc. * * * (and) to create the office of Election Commissioner, provide for **his** appointment and define **his** duties," etc., the body of the act provides for the appointment of "A Board of Election Commissioners," and is framed on the idea of a Board consisting of three members instead of a single officer, as originally provided for in the bill.

The amendment also added three new sections to the original bill, one (Section 47), providing that **the act of the majority of the Board** shall in all cases be considered the act of the Board; another (Section 48), that the Board shall audit all claims and draw a warrant therefor "upon the proper officer;" and another (Section 49), providing that "All acts and parts of acts inconsistent or in conflict with this act

are hereby repealed, and the act entitled 'An act to create a Board of Election Commissioners, etc., approved May 31, 1895,' is hereby repealed."

This engrossed bill is "Respondents' Exhibit B" and was introduced in evidence (Transcript, page 36), and will be found at length at pages 81 to 100 of the Transcript. It is the engrossed bill printed by order of the House for its use.

Afterward the bill, as so amended, **but under the original title,** was put on its passage in the House and passed exactly as appears in "Respondents' Exhibit B." After its passage in the House, its title was amended (see "Respondents' Exhibit D," page 148 of Transcript), so as to read as follows: "An act to provide for the registration of voters in cities now having or which hereafter may have 300,000 inhabitants or more; **to provide for the creation of a Board of Election Commissioners;** provide for **its** appointment and define **its** duties; to govern elections in such cities, defining offenses and providing penalties therefor, and to prescribe rules and regulations governing registration and elections therein, **and to repeal all Acts and parts of Acts in conflict or inconsistent herewith.**" The amendments to the original title made in the House are indicated by **black type.** That is, the bill, as it went to engrossment and was passed, had the original title under which it was introduced by Mr. Nesbit; but in the body of the bill, all that part of it following the enacting clause, was a new bill. It was ordered to engrossment under the original title and enacting clause, but with a new body, and was so passed by the House; after that, the title itself was amended, as above indicated, in the House.

It appears, affirmatively, as alleged in the return, by the Senate Journal, "Respondents' Exhibit C", Transcript pages 139 to 149, which was introduced in evidence as well as filed as an exhibit with the Respondents' return (Transcript, page 38), **that when the bill was received in**

the Senate, read the first and the second time, referred to a committee, reported back adversley by the committee, read the third time, passed, received back from the House and signed by the President of the Senate in the presence of the Senate, it was under the title originally given the Nesbit bill, namely: "An act to provide for the registration of voters in cities now having or which hereafter may have 300,000 inhabitants or more; **to create the office of Election Commissioner,** provide for **his** appointment and define **his** duties; to govern elections in such cities, defining offenses and providing penalties therefor, and to prescribe rules and regulations governing registration and elections therein."

No act or bill, as shown by the Senate Journal ("Respondents' Exhibit C"), was ever before the Senate with the designation "House Bill No. 760" or with any other designation, under the title adopted by the House, namely, "An act to provide for the registration of voters in cities now having or which hereafter may have 300,000 inhabitants or more; to provide for the creation of a Board of Election Commissioners, to provide for its appointment and define its duties; to govern elections in such cities, defining offenses and providing penalties therefor, and prescribe rules and regulations governing registration and elections therein, and to repeal all acts and parts of acts in conflict or inconsistent herewith."

Under this last mentioned title, however, it appears in the Session Acts of 1899, pages 179 and following, and was certified to by the Secretary of State as a true copy of the enrolled bill passed by the General Assembly and approved by the Governor, and was offered in evidence by the Defendant in Error (Transcript, pages 34 and 35), and is "Relators' Exhibit 1" (Transcript, pages 40 to 60), and it appears in Volume 2, Revised Statutes of 1899 (pages 1683 to 1699) as Sections 7222 to 7269, under the title "Article VIII., Registrations and Elections in cities with 300,000 inhabitants or over."

But to repeat, it appears affirmatively by the Journal of the Senate that no act under the last mentioned title was ever before that body, or any committee thereof, or ever received the signature of the presiding officer of the Senate. The only "House Bill No. 760" introduced by Nesbit in the House which was before the Senate being under the title that the bill originally bore when first introduced by Nesbit, and as appears in "Respondents' Exhibit A."

The Journals, under the Constitution and the decisions of the Supreme Court of Missouri, may be received in evidence and examined, to determine whether a law has been passed in accordance with the constitutional requirements, and these Journals are the best and highest evidence, controling the enrolled bill itself.

Douglas v. The Bank, 1 Mo 24;
State v. McBride, 4 Mo. 305;
State *ex rel.* v. Mead, 71 Mo. 266;
State v. Wray, 109 Mo. 594;
Wells v. Mo. Pac. R'way Co., 110 Mo. 286;
State *ex rel.* v. Field, 119 Mo. 593.

The officially printed bills are legal and competent evidence, 1 Rev. Stat., Mo., 1899, Secs. 3091 and 3093; and under the Constitution are as essentially a part of the legislative proceedings as the Journals themselves.

Constitution, Art. IV., Secs. 27 and 29.

Directly after this "Nesbit law" so-called was supposed to have gone into effect, the Governor, assuming to act under it, appointed three persons as members of the Board of Election Commissioners for the City of St. Louis, two belonging to one political party, one to another; whereupon two suits were instituted in the Circuit Court of the City of St. Louis, that being the court of general civil jurisdiction, against the appointees, being the same persons who are defendants in error in this suit and others. One suit was by Aloe and other citizens and taxpayers of St. Louis; and the other was by

Theo. C. Eggers, Circuit Attorney of the City of St. Louis. Both suits were by bills in equity, to restrain the appointees under the "Nesbit law" from taking possession of the office of Election Commissioners, or dispossessing the incumbents who were in office and appointed under the law of 1895, and to restrain the then incumbents from turning over the office and property in their possession to the new appointees. It was claimed that the so-called Nesbit law was an unconstitutional enactment, in violation of the Constitution of the State of Missouri and of the first section of the Fourteenth Amendment to the Constitution of the United States.

The defendants, McCaffery and others, who are respondents in this case, and who are appointees of the Governor under the Nesbit law, sued out writs of prohibition in the Supreme Court of the State against the Judges of the St. Louis Circuit Court and the plaintiffs in those cases, to prohibit that court from proceeding therein, they contending that that court had no jurisdiction over the subject matter, and that equity could afford no relief in in such cases.

Prohibitions were issued in both cases by the Supreme Court of the State, that court sustaining such contention; the decisions in the cases being reported in 152 Mo., the Aloe case at page 466, and the Eggers case at page 485.

The Governor's appointees, Defendants in Error in this cause, having taken office under the so-called Nesbit law, demanded of Plaintiff in Error, who is Auditor of the City of St. Louis, that he audit their accounts as Election Commissioners of the City of St. Louis and draw warrants therefor on the City Treasurer. Upon his declining to do so, the present action was instituted in the State Supreme Court by Defendants in Error, and a writ of mandamus prayed for from that court against Plaintiff in Error.

An alternative writ, or rule to show cause, was duly issued out of the Supreme Court of Missouri (Transcript,

pages 14 to 18) and served, to which Plaintiff in Error made return (Transcript, pages 19 to 33), on which issue was joined, the cause submitted to the court (Transcript, page 150), the rule made absolute, and the writ ordered issued (Transcript, page 151). A motion for rehearing was duly filed (Transcript, pages 165 to 170), which was overruled (Transcript, page 170); a writ of error was sued out and allowed by the Chief Justice of the State Supreme Court (Transcript, pages 1 and 171), who also signed the citation, which was duly served (Transcript, page 2); an assignment of errors (Transcript, pages 3 and 171) was duly filed and bond filed, which was approved (Transcript, pages 176 to 178) by the Chief Justice. Prayer for reversal (Transcript, page 2) was also filed.

The return of Plaintiff in Error, Respondent below, (Transcript, pages 19 to 33) admitted that the Relators claimed office under the so-called Nesbit act; avers that appointment under that is the only claim or color under which Relators claimed or assumed to hold office, and avers that the so-called Nesbit act is not, and never was, a valid law, because, as shown affirmatively by the Senate Journal, Exhibit "C," no act or bill under the title of the pretended act ever was in fact before the Senate for its consideration, or ever received the concurrence of the Senate, or ever was signed by the presiding officer thereof; because said act was not enacted, as provided by the Constitution of Missouri; because not passed by both Houses of the General Assembly; because, even if enacted in a constitutional manner, it is inconsistent and in conflict with various quoted provisions of the Constitution of that State; and because it is in conflict with the First Section of the Fourteenth Amendment to the Constitution of the United States, in that it denies to the citizens of the United States residing in the City of St. Louis, inhabitants of and within the jurisdiction of the State of Missouri, the equal protection of the laws.

The return also denied that the Municipal Assembly of the City of St. Louis had made any appropriation applicable to the payment of the salaries or expenses of the Commissioners appointed under the Nesbit law.

It was also claimed in the return that the only legal Election Commissioners for the City of St. Louis were those officers appointed under the Act of May 31, 1895; that said last-named act was and is the only constitutional enactment relating to registration and elections in cities of over 100,000 inhabitants in force in the city of St. Louis, and that it had not been repealed. and that the relators were not appointed and had no title to office under it, but that their title was solely under the invalid and unconstitutional Nesbit law.

A general denial was made to this return and testimony taken in behalf of both parties, by order of the Court, and returned to the Court.

Apart from certain stipulations made by counsel, the testimony was all documentary and is all in the Transcript, pages 34 to 151.

The Relators below, the Defendants in Error here, introduced a copy, certified by the Secretary of State, of what purported to be the original roll of the so-called Nesbit bill. This was "Respondents' Exhibit 1;" it also embraces certified copies of various certificates by the committee on enrollment and by the Governor, and of what is called a protest. It is on pages 40 to 60 of the Transcript. The title and body are the same as in Session Acts, 1899, page 179, before referred to, and the body the same as Chapter 102, Article VIII., in the Revised Statutes of 1899.

The Relators also introduced in evidence a certified copy of an ordinance of the Municipal Assembly of the City of St. Louis approved August 7, 1899, appropriating $75,849.25 for salaries, election expenses and office expenses of the Election Commissioners of the City of St. Louis.

25578

In passing and disposing of this feature of the case, we state that under the Constitution of the State of Missouri, Sec. 36, Art. IV., laws take effect, unless otherwise provided, in ninety days after the adjournment of the session of the General Assembly at which they were passed. The Fortieth General Assembly adjourned May 22, 1899; therefore, this Nesbit law, if a law, took effect August 20, 1899, it having no "emergency clause," and it was claimed by Plaintiff in Error that the appropriation made by the Municipal Assembly on August 7, 1899, was for salaries, expenses, etc., of the Election Commissioners appointed under the law of 1895, and was not available for those claiming appointment under the new law of 1899 which had not then, on August 7, 1899, gone into effect.

It was stipulated by counsel, for the benefit of Defendants in Error (Transcript, pages 150 and 151), that so much of the Journals of the Senate and House of the Fortieth General Assembly as contained the rules set forth and adopted by the two bodies for their government, and so much of Jefferson's Manual and Digest of Rules, etc., of the House of Representatives of the United States, prepared by N. T. Crutchfield, and adopted at the second session of the Fifty-third Congress, as relate to the amendments of titles be considered as introduced in evidence. As neither of these was, in point of fact, referred to, and no point made on them by Relators, further notice of them is omitted.

This was all the testimony of Relators below.

Respondent below, Plaintiff in Error, introduced the following bills, as printed for the use of the House and Senate, namely:

Exhibit "A" (Transcript, pages 35 and 62 to 81), being the original Nesbit bill.

Exhibit "B," the Nesbit bill as engrossed in the House and printed for its use. (Transcript, pages 36 and 81 to 100.)

Exhibit "E," House bill No. 760, as printed by order of the Senate. (Transcript, pages 36 and 100 to 117.)

Also the following documents:

Exhibit "F," a certified copy of the Nesbit bill, as certified to have been enrolled. (Transcript, pages 137 and 120 to 139.) This is identical, so far as the bill is concerned, with "Relators' Exhibit 1."

Exhibit "D" (Transcript, page 37), which "contains all the entries of the Journal of the House of Representatives of the Fortieth General Assembly of this State, which relate to House bill No. 760, also designated as the Nesbit bill, and the printed pages being pages 1673 to 1685, both inclusive, contained in said Exhibit 'D' contain all that appears in said Journal of date May 22, 1899, and said Exhibit 'D' may be used in evidence as if duly certified by the Secretary of State, the same consisting of pages from said House Journal as officially printed and published. This stipulation is made subject to whatever objection may be made thereto by Relators."

(The Exhibit will be found in the Transcript, pages 145 and following.)

Exhibit "C," being the same filed with Respondents' return in the cause, and being a certified copy from the Secretary of State of the Journal of the Senate of the Fortieth General Assembly of the State of Missouri, as far as it relates to House bill No. 760. (Transcript, page 38.) The Exhibit is on page 139 and following of the Transcript.

This was all the testimony introduced or offered by either party.

Defendants in Error, Relators below, objected to each of the foregoing Exhibits as introduced, and at the conclusion of the introduction of evidence, moved to strike them out.

The Court did not formally pass on these objections or motions. Its views as to them can only be gathered from the opinion.

The cause was argued and submitted to the Court on the pleadings, evidence and motions on February 8, 1900, and

on March 13, following, the Court awarded a peremptory mandamus (page 151), delivering an opinion in the conclusions of which six of the seven Judges composing the Court concurred, three of them dissenting as to part of it. One of the seven Judges of the Court is not recorded on one side or the other.

In brief, the opinion holds:

1st. That in the absence of a protest by members of the Senate, the objection made to a failure to observe constitutional requirements in the passage of a bill through the two houses cannot be inquired into by the Court.

2d. That in the case at bar, the only protest made to the Nesbit bill in its passage through the Senate, was on the ground that it was a special and not a general law, and that that was therefore the only objection the Court could consider in connection with its passage, and the Court, entering into an examination of this question, three of the Judges hold that while it was a valid objection, as decided by the Supreme Court in Murnane's case (Murnane v. City of St. Louis, 123 Mo. 479), that case, on the authority of the case of Kansas City v. Stegmiller, 151 Mo. 189, and the subsequent case of the State *ex rel.* Hawes v. Mason, 153 Mo. 23, was no longer authority. Three of the Judges dissented on this, the seventh Judge not taking any part in the decision, so that on this important point a majority of the Court did not concur. The Court failed to notice in any manner the contention of plaintiff in error that the Nesbit bill had never been read under its amended title, as shown affirmatively by the Journal of the Senate, and had never been before the Senate, or any of its committees under that title.

This, the main contention of Plaintiff in Error in the Court below against the constitutional enactment of the law, is passed over in the opinion of the Court in absolute silence.

The Court also failed to notice the contention of Plaintiff in Error, that no protest as to the change of title could possibly have been made by any Senator, for the Journal of the Senate shows affirmatively that but one title, and that the original one, was ever before the Senate, and that the title as amended by the House was never before the Senate.

3d. Noticing the contention that various other constitutional requirements had not been complied with, both as to manner of passage of the bill and the sufficiency of the title, the Court overrules them.

4th. At page 159, Transcript, the Court again takes up the contention of Plaintiff in Error, that the law violates Section 53 of Article IV. of the Constitution, "Because it is a local or special law; (2) regulating the affairs of counties, cities, etc.; (11) for the opening and conducting of elections, and fixing or changing the places of voting; (14) creating offices and prescribing the powers and duties of officers in counties, cities, townships, election or school districts; (32) passing of a local or special law where a general law can be applicable, and making it a judicial question, etc." And the Court says: "All of these objections are answered by the adjudication of Kansas City v. Stegmiller (151 Mo. 189) and State *ex rel.* Hawes v. Mason (153 Mo. 23), that St. Louis stands alone and that a law designating that city would be valid and a general law."

5th. Notice is then taken of the complaint that the law violates Sections 2, 5, 8, 10 and 12 of Article VIII. of the State Constitution. These provisions are also held not to been have violated.

6th. The opinion again takes up Section 5 of Article VIII. of the Constitution, requiring registration, and enters upon an argument to demonstrate the constitutionality of registration laws in general. As we made no con-

25580

tention to the contrary, we will not notice this any further.

7th. On page 160 of Transcript the Court takes up the contention of the Plaintiff in Error, that the law in question "deprives the citizens of the United States residing in the City of St. Louis of their right to the equal protection of the law, and imposes on citizens of said city unconstitutional requirements as preliminary to their right to vote and hold office, and is null and void." The Court answers this objection by referring to the provisions of the registration laws of several States to show that it is as fair a law as that of Ohio, Kentucky, Illinois or Massachusetts.

8th. Resuming discussion of the question as to whether or not it is a law denying to citizens of St. Louis the equal protection of the laws guaranteed by the Frst Section of the Fourteenth Amendment to the Constitution of the United States, the opinion quotes from Mr. Justice Bradley in the case of Missouri vs. Lewis, 101 U. S. 31, as sustaining the right of the State to adopt any system of law or judicature it sees fit, for all or any part of its territory, and concludes by denying the contention of the Plaintiff in Error that the Nesbit law violates this section of the Fourteenth Amendment to the Constitution of the United States.

9th. The Court again notices the registration and election laws of Ohio, Illinois and Kentucky, for the purpose of calling attention to the fact that, in their general features, most of them appear to be designed for the same purpose, to-wit, that of preventing fraud and of making it more difficult to defeat the will of the people, as recorded, or as intended to be recorded at the polls, and it refers to the Nesbit law as one standing a fair comparison with the laws of the States named. Counsel on neither side referred to these laws.

10th. The Court holds that so far as relates to cities of 300,000 inhabitants or over, the Nesbit law repealed the law of 1895, and that it is not necessary for the Court, in this case, to discuss the effect on the law of 1895, of what is known as the "Cardwell act."

Finally, the Court holds that the appropriation made by the Municipal Assembly for the payment of Election Commissioners is available for the payment of Election Commissioners appointed under the Nesbit Law.

This opinion, written by Judge Sherwood, is concurred in **in toto** by Judges Burgess and Marshall; Judges Gantt, Brace and Valliant concurring in all except the remarks about the Murnane case, and saying in a separate opinion that the Murnane case involved a change of the Charter of the City of St. Louis in respect to municipal functions, and that it was therefore not in point in the present case.

Within due time, a motion for rehearing was filed in the cause, which assigned the following reasons:

1st. That questions decisive of the case and duly submitted by counsel have been overlooked by the Court.

2d. That the decision is in conflict with the provisions of the Constitution of the State of Missouri.

3d. That the decision is in conflict with the first section of the Fourteenth Amendment to the Constitution of the United States.

4th. That it is in conflict with decisions of the Supreme Court of the State of Missouri.

5th. That the law is in conflict with the first section of the Fourteenth Amendment to the Constitution of the United States.

6th. That the law and the decision deny to citizens of the United States, inhabitants of the City of St. Louis and within the jurisdiction of the State of Missouri, the equal protection of the laws.

This motion was overruled.

The Court holds that the law of May 31, 1895, is repealed as to cities of 300,000 inhabitants and over by the Nesbit law. This leaves the law of 1895 operative only in cities of 100,000 and up to 300,000 inhabitants, and gives us one law (the Nesbit) governing registration and elections in cities of over 300,000 population; and another (the law of 1895) governing cities of 100,000 and up to 300,000 population.

The act of 1895 is incorporated in the revision of 1899 by the revisors, who were all members of the General Assembly that passed the Nesbit act, and published and certified by the Secretary of State as an existing law governing cities containing a population of over 100,000 and not exceeding 300,000, as Article IX. of Chapter 102 of the Revised Statutes of 1899, and so is the Nesbit law also, as an existing law governing cities of 300,000 and over, and being Article VIII. of the same revision and Chapter. The revision was published after the opinion had been announced in this case.

Taking up our contention that the Nesbit law violates the provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it denies to the citizens of St. Louis the equal protection of the laws, we call attention to the provisions of the Nesbit law, to those of the act of May 31, 1895, and to certain penal provisions of the General Election Law of this State.

In citing the provisions of the Nesbit law, for the convenience of Court we refer to that law as contained in the Transcript (pages 40 to 59) as "Relator's Exhibit I," and being a copy of the act as certified by the Secretary of State. It is also contained in Volume 2, Revised Statutes of Missouri for 1899, at page 1683 and following, being Article VIII. of Chapter 102.

In referring to the law of May 31, 1895, and for brevity called the law of 1895, we cite from Volume 2 of the Re-

vised Statutes of Missouri for 1899, being Article IX. of Chapter 102 of that revision, and numbered Sections 7270 to 7369.

We quote in full or abstract such sections of the several laws as we consider material.

Sec. 2. Nesbit Law. Appointment of Commissioners; and Sec. 47. Majority to govern.

Section 2 of the Nesbit law (Transcript, page 41) provides for the appointment by the Governor of three Election Commissioners, one of whom shall belong to the "leading party politically opposed to that to which the Governor belongs." **This apparent division between the parties is nullified by Section 47** (Transcript, page 59), **which provides that the act of a majority shall in all cases arising under the act be considered as the act of the Board.**

Law of 1895, Sec. 7271.

The Act of 1895, as amended by the "Cardwell act" of 1899, also provides (Section 7271) for the appointment by the Governor of three Election Commissioners, one of whom shall be designated as Chairman, and one as Secretary, and the third one of whom shall be chosen from "three eligible citizens named by the City Central Committee of said leading party politically opposed to that to which the Chairman and Secretary belong." There is no provision that the act of the majority shall govern; on the contrary, see Sections 7271 and **7276,** *infra.*

Sec. 3. Nesbit Law. Appointment of Deputy and Clerks,

Section 3 of the Nesbit law (Transcript, page 41) authorizes the Election Commissioners to appoint and commission "one Deputy Election Commissioner, who shall hold his office during the pleasure of said Commissioners, and shall be vested with all the powers and duties of the Commissioners during their absence, sickness or inability to perform their duties; said Deputy Election Commissioner shall also be the Secretary of the Board of Election Commissioners." Such Commissioner shall have the "right and may employ additional

clerical and other assistance from time to time as may be necessary to promptly and correctly perform the duties of the office."

Section 3 also provides: "The offices and Boards of Election Commissioners, as now constituted and existing in such cities to which this act applies, are hereby abolished, and the commission of such Election Commissioners is hereby revoked, and all acts and parts of acts inconsistent with this act, in so far as they apply to cities named herein are hereby repealed." There is no provision anywhere in the law other than this for the vacation of offices in cities now having over 300,000 inhabitants, and no provision whatever for the vacation of offices in cities which shall hereafter contain a population of 300,000 and over.

And Vacation of Former Offices.

In the act of 1895 there is no provision for the appointment of a Deputy Election Commissioner, one of the Commissioners, as we have seen, being Secretary, and the provisions for the employment of clerks and assistants is as follows (Section 7271): "Said Board shall have the right to employ such additional assistants from time to time as may be necessary to promptly and correctly perform the duties of the office under the direction of the Board. **The Commissioner belonging to the leading party politically opposed to that to which the Chairman and Secretary belong shall appoint two assistants** who shall serve a term commencing thirty days before any election day and ending thirty days after said election day."

Law of 1895. Sec. 7271.

By Section 5 of the Nesbit law (page 42 of Transcript) the Election Commisssioners "and Deputy Election Commissioner shall have the power, and are hereby authorized to register any person or persons in said office of Election Commissioner, and re-register or transfer any person or persons who may have changed

Sec. 5. Nesbit Law. Registration in Office.

their residence from one ward to another ward, or from one precinct to another, in any ward at any time, excepting on such day or days on which a precinct registration may be held in said city, and except on such days as intervene between the completion of the registration herein provided and the next following election."

Law of 1895.

There is no such provision in the act of of 1895; under that act all registration being conducted in the several election precincts into which the city is divided.

Sec. 8. Nesbit Law. Appointment of Judges and Clerks of Election.

Section 8 of the Nesbit law (Transcript, page 43) provides that the Board of Election Commissioners shall, at least 60 days prior to the first city or state election after the act becomes a law (and every four years thereafter prior to the general elections), "select and choose four electors as judges of election for each precinct in said City. * * * Two clerks of election for each precinct shall also be selected within the same time by said Commissioners, who shall possess the same qualifications as the judges aforesaid. * * * Two of said judges and one of said clerks **shall belong to and be members of the party of opposite politics to the other two judges and clerks.**" We have noted that Section 47 (Transcript, page 59) provides that the act of the majority of the Board shall in all cases be considered as the act of the Board, so that the selection of all the judges and clerks is in the hands of the two represenatives of one party alone.

Sections 7276, 7277 and 7278 of the act of 1895 relate to the selection and appointment of judges and clerks of election.

Section 7276 provides that, "In the selection of the judges

and clerks of election, two judges and one clerk shall be selected from each of the two political parties of the State **polling the largest number of votes at the last general election,** to serve in each precinct, **who shall be recognized members of the party from which they are selected. The Commissioner, or Commissioners, shall select the judges and clerk to represent the party to which said Commissioner, or Commissioners belong;** and the person thus selected shall be appointed and commissioned by the Board, if qualified and confirmed." If a vacancy occurs it is to be filled in like manner as the original appointment.

Law 1895. Sec. 7276. Selection of Judges and Clerks.

Section 7277 requires the persons selected as judges and clerks to appear before the Board of Election Commissioners for examination as to their qualifications, and further provides that, "The judges and clerks shall be exempt from jury duty during the term of their service."

Law 1895. Sec. 7277. Judges and Clerks Exempt from Jury Service.

Section 7278 provides that as soon as the judges and clerks selected are found qualified, "a report of such selection shall be made and filed in the Circuit Court of the city or county, signed by said Commissioners, certifying that the provisions of this Article in regard to their selection and qualifications have been complied with, and designating the particular political party from which each judge or clerk is appointed, and an application in writing shall be therewith made by said Commissioners before said Court for the confirmation of said appointments, whereupon the Circuit Court, or a Judge thereof, shall enter an order that

Law 1895. Sec. 7278. List of Judges and Clerks to be Filed in Court,

cause be shown, if any exists, against the confirmation of the appointment of any person so selected as judge or clerk before the opening of court on a day to be fixed by the Court or said Judge." Notice of the order and the names, residences, precincts and politics of the parties so appointed and of the date of hearing of objections are to be published in newspapers of the city, and on the day designated any persons desiring to object to any of the judges or clerks selected may present such objections and they and the parties objected to are heard in a summary manner before the Court, and if the objections are sustained the Election Commissioners are required to name others in their stead, who may again be objected to until satisfactory parties are selected, the Court confirming by a *pro forma* order all appointments made by the Election Commissioners against whom no objections have been filed, or against whom objections have not been sustained.

And Notice of Filing Published and Objections to Names Heard in Court.

No provisions whatever of a like character are in the Nesbit law, the only section relating to their appointment and qualifications being Section 8, above referred to.

It is to be noted again in this connection that Section 47 of the Nesbit act (Transcript, page 59) provides that "The act of the majority of such Board of Election Commissioners shall in all cases arising under this act be considered as the act of said Board of Election Commissioners, so that practically the Nesbit act abolishes the bi-partisan character of the Board, reposes the appointment of judges and clerks in the arbitrary discretion of the two members of the Board who are of the same political party, does not require two of the judges and one of the clerks to be of "the leading party politically opposed" to the other two, but simply that they shall be "members of the party of opposite politics" to the other two judges and clerk; does not

25584

extend exemption from jury service to the judges and clerks during their term of service, does not give the citizens of the precincts and wards any opportunity to be heard either before the Board or the Court, or any other person, body or tribunal, as to the persons selected, but leaves that whole matter to the arbitrary discretion of a majority of the Board, or, in their absence, with their Deputy; nor is any publication made of the judges and clerks selected.

Judges and Clerks Act as Registration Officers.

Both laws provide that the judges shall act as registering officers and the clerks as canvassers of the registration lists in their several precincts.

Both laws also provide for registration in the several precincts and for canvassing of the registration therein by the judges and clerks of the several precincts, acting as a Board of Registration, on the three days when registration is provided to be had in the precincts, namely: on the Tuesday four weeks before the general election; on the Saturday following said Tuesday; and on the Tuesday following that Saturday; the said last named Tuesday being the third Tuesday before the election; (all State elections in Missouri being held on the Tuesday following the first Monday in November, and all City elections on the first Tuesday in April); the last day of registration in the precincts being the third Tuesday before the election.

Registration in Precincts.

This is the only registration provided for under the law of 1895, as before noted, whereas, as already noted, Section 5 of the Nesbit law provides for registration at the general office of the Board of Election Commissioners in the City Hall, at all times, except on such days as registration is being conducted in the precincts, and on the days following the close of registration in the precincts and the day

of the ensuing election. But, as will be noted hereafter, by other provisions in Section 21 of the Nesbit law (Transcript, page 50), the Board of Election Commissioners are allowed, on the Thursday, Friday and Saturday of the week immediately prior to the week in which the general election is held, sitting as a Board of Appeals, to register as qualified voters such persons as may make application, who had failed to appear before the precinct Board of Registration "because of sickness, forgetfulness, absence from the city or other reasonable cause," at the time of precinct registration.

Sec. 21. Nesbit Law. Registration by Board.

So that, taking Sections 5 and 21 of the Nesbit Law together, registration can be conducted at the general office of the Board of Election Commissioners in the City Hall, at all times, **except** on the Tuesday four weeks before the general election, on the Saturday following that Tuesday and on the Tuesday following that Saturday (which last mentioned Tuesday is the third Tuesday before the election), **and except** between that Tuesday and the Thursday immediately preceding the election. At all other times, down to and even including the Saturday immediataly preceding the election, registration can be conducted at the general office of the Election Commissioners in the City Hall, by the Board, by their Deputy and by their clerks, the majority of the Board controlling, and the Deputy and all the clerical force of the office being appointees of the majority, and there being no provision whatever for challenging the registration nor any check or scrutiny whatever of the acts of the Board or its partisans.

Secs. 5 and 21, Nesbit Law— Registration by Board.

There is no such provision in the Act of 1895, all registration being made under that law by the Precinct Boards of Registration in each voting precinct, at which representatives of all parties may be present and challenge, and registration closing therein on the third

Law of 1895— Registration in Precincts.

Tuesday before the general election, between which date and the election there can be no new names added to the registration.

The Nesbit law (Sections 9 to 21) provides for the registration in precincts by the Precinct Boards and a canvass of that registration by the precinct clerks under the direction of the Precinct Board.

At the completion of this canvass by the clerks they are required to mail notices as well as leave them at the address given, and, if possible, serve them personally on such persons as are thought to be improperly entered on the registration list, and on the Saturday following the Tuesday three weeks preceding election, the Board of Registration of each precinct meets at the place designated in the precinct and checks up the registration list with the report of the canvassers, and if, during the last hour of that day's session, any person notified to appear shall not appear and show cause why his name should not be erased from the register, his name shall be erased. At this session any voter of the ward may apply to the Board to have any name upon such registry of any precinct erased, of which application he shall give the person whose name he seeks to erase, **in writing or otherwise,** at least one day's notice before the day of said session. If the person objected to does not appear, his name is erased.

Sec. 21, Nesbit Law—Appeals to Board.

The only appeal allowed under the Nesbit law is by a person whose name has been erased or refused registration; this is given by Section 21, and the appeal is to the Board of Election Commissioners **alone.** The Election Commissioners, on Thursday, Friday and Saturday of the week preceding the election, sit as a Board of Appeal to hear such applications and appeals as shall be made to be placed upon the registry of voters of any particular precinct "of persons who applied for registration and were refused by the Board of Registration, or had

their names stricken from the registry by said Board." There is no right of appeal, even to the Board, by citizens who have challenged or desire to challenge the unlawful registration of a name or names by the precinct registers; nor is the right of appeal given to anyone from the action of the Board of Election Commissioners to any court, body or tribunal whatsoever.

Sections 7288 to 7300, Law 1895. Appeals to the Board and Court.

The law of 1895 (Sections 7288 to 7300) provides for registration in the precincts of the several wards. Any citizen of a ward may, by presenting a verified protest, challenge the right of any person to register, whose name appears on the list. The clerks act as canvassers, as in the other law, and at the close of the registration, the Board of Election Commissioners sit (Section 7298) to hear applications for erasure of any name on the registry, and to hear appeals from any action of the Precinct Boards of Registration in refusing registration to any one claiming the right to register. The Board of Election Commissioners, as a preliminary Board of Appeal, are to decide all such questions forthwith, and are to make up a docket of their action, showing all cases before them that have been stricken from the lists, refused registration, or registered on appeal, and on the Friday and Saturday of the week prior to the week in which the election is held (see Sections 7299 and 7300) the Circuit Court of the city with this docket before it, filed with it by the Election Commissioners, sits in special term to hear all appeals from the action of the Board of Election Commissioners in refusing to erase from or in refusing to restore to or place any names on the registration lists, and any person desiring to appeal from the judgment of the Circuit Court is given the right of appeal to the Supreme Court, or Court of Appeals, as the case may be.

Sections 7299 and 7300, Act 1895. Hearing in Court.

As will be noticed, the Nesbit law gives no such right of appeal to the Courts, confining the right of appeal to the Board of Election Commissioners, and then only in cases in which the Precinct Board of Registration refused to register a party. It grants no appeal whatever to any one, to any body, tribunal or court from the action of the Precinct Boards of Registration, or from the action of the Board of Election Commissioners itself, in the matter of adding names to the registration list, the addition of new names to the registration list under the Nesbit Law being left solely within the power and arbitrary, uncontrolled discretion of the Board of Election Commissioners itself, that body determining **all questions** by majority vote.

Section 21, Nesbit Law. Board May Register.

Section 21 of the Nesbit law (Transcript, page 50) furthermore provides: "Said Board of Appeals" (that is to say, the Board of Election Commissioners sitting as a Board of Appeals on the Thursday, Friday and Saturday of the week immediately prior to the week in which the general election is held) "may also register as qualified voters such persons as may make application, who failed to appear before the Board of Registration (in the precincts) because of sickness, **forgetfulness**, absence from the city, or other reasonable cause at the time of precinct registration." The law provides no canvassing whatever of this additional registration, conducted unchallenged and uninspected practically down to the very day of election, in the office of the Election Commissioners by their appointee, Sunday only intervening. Other sections of the law provide that on Monday the registration and poll books are to be delivered to one of the Judges of Election in each precinct, and consequently there is no opportunity whatever for any parties outside of the Board of Election Commissioners themselves and their clerks and appointees to know who are

the registered voters when the polls open on the day of election, and there is no check whatever to prevent the Board of Election Commissioners, or their Deputy and appointees, from adding hundreds or even thousands of new names to the registration on the three days immediately preceding the election, and no provision whatever for canvassing or verifying the names so added, and no means whatever provided for the publication of the new names added or of names stricken off.

Nesbit Law.— No Canvass of Registration by Board.

The law of 1895 admits of no such scheme, nor of anything like it.

The provisions of the two laws for the conduct of the election itself are so much alike that it is unnecessary to call attention to them, and under both laws the Board of Election Commissioners are made the canvassers of the returns of the election.

Both Laws.— Conduct of Elections.

Sections 39 to 44 of the Nesbit law (Transcript, pages 57 and 58) are the only sections of that law prescribing punishments and penalties for and defining what are offenses committed in connection with registration and elections.

Frauds in Registration, and Penalties.—Nesbit Law.

Section 39 is the only one in that law relating to frauds in connection with registration. It enacts that any person

"Upon conviction, shall be adjudged guilty of a felony and **punished in the penitentiary** not less than two years: who shall impersonate an elector, or other person, or register or attempt to offer to register the name of such elector or other person;"

Or who "Shall fraudulently register, or offer, or attempt to register in or under the name of any other person, or in or under any assumed or fictitious name, or in or under any name not his own;"

Or "Who shall register in two election precints;"

Or "Having registered in one precinct, shall attempt to register in another;"

Or "Shall knowingly, by false personation or otherwise cause or procure, or attempt to procure the name of any qualified voter in any election precinct, to be erased or stricken from any registry of voters of such precinct made in pursuance of this act or otherwise as in this act provided;"

Or "Who by force, threat, menace, intimidation, bribery, reward, or offer or promise thereof, or other unlawful means, prevents, hinders or delays any person having a legal right to register or to be registered, from duly exercising such right; "

Or "Who shall solicit, counsel, or induce by unlawful means, any officer of registration to register any person not entitled to registration in such precinct; or to register any false, assumed or fictitious name, or any name of any person except as provided in this act."

These are all the offenses against registration denounced by the Nesbit law, and, as before stated, the person committing them "shall, on conviction, be adjudged guilty of a felony and **punished in the penitentiary** not less than two years."

Under this section, the offender convicted, if punishable at all, is to be punished in the penitentiary for not less than two years; he may be punished for life.

Frauds in Registration and Penalties.—Law of 1895.

In the law of 1895, Section 7234, is the one which defines offenses connected with registration under that law, and it enacts that any person convicted of any of them "shall be adjudged guilty of a felony, and shall be punished **by imprisonment** in the penitentiary for **not less** than two **nor more** than five years."

The offenses connected with registration enumerated in Section 7234 of the law of 1895 are:

"Falsely impersonating an elector or other person, and registering or offering to register in the name of such elector or other person;"

Or "Knowingly or fraudulently registering or offering or attempting to make application to register, in or under the name of any other person, or in or under the name of any false, assumed or fictitious name, or in or under any name not his own;"

Or "Knowingly or fraudulently registering in two election precincts;"

Or "Having registered in one precinct, fraudulently, attempting or offering to register in another, or fraudulently registering, or attempting or offering to register in any election precinct, not having a lawful right to register therein;"

Or "Knowingly or wilfully doing any unlawful act to secure registration for himself or any other person;"

Or "Knowingly, wilfully or fraudulently, by false representation or otherwise, or by any unlawful means, cause or procure, or attempt to procure the name of any qualified voter in any election precinct to be erased or stricken from any registry of voters of such precinct, in pursuance of the law or otherwise, as in the act provided;"

Or "By force, threat, menace, intimidation, bribery, reward or offer or promise thereof, or other unlawful means, preventing, hindering or delaying any person having a lawful right to register, or to be registered, from duly exercising such right;"

Or "Knowingly, wilfully or fraudulently soliciting, compelling or inducing, or attempting or offering to solicit, compel or induce, by such means, or any unlawful means, any judge of election, or other officer of registration in any election precinct, to register or admit to registration any person not lawfully entitled to registration in such precinct;"

Or "To register any false, assumed or fictitious name, or any name of any person, except as provided in the Act;"

Or "Knowingly or wilfully or fraudulently interferring with, hindering or delaying any judge of election, or other

officer of registration, in the discharge of his duties, or counsel, advise, or induce, or attempt to induce, any such judge, or other officer, to refuse or neglect to comply with or to perform his duties, or to violate any law prescribed for regulating the same;"

Or "Who shall aid, counsel, procure, solicit or advise any voter, person, judge of election, or other officer of registration, to do any act by law forbidden, or in this act constituted an offense, or to omit to do any act by law directed to be done;"

Or "Being a judge or clerk of election, shall at any registration of voters, knowingly and wilfully misspell the name of any person who applies to register, when he writes said name on the register book, or who writes therein a name other than the name given him by the applicant instead of said name, or shall under the column 'Residents' on the line with any applicant's name, enter any street or number other than that given him by said applicant, or shall fail or neglect to enter in said column the street and number designated by the house or room as given him by said applicant."

Frauds at Elections, and Penalties.—Nesbit Law.

Section 40 of the Nesbit law is the only one in that act relating to offenses committed at elections. It provides that any person, upon conviction, shall be held guilty of a felony, and punished for every such offense by imprisonment in the penitentiary **not less than two years:**

"Who shall falsely impersonate an elector or other person, and vote, or attempt or offer to vote, in or upon the name of such elector or other person;"

Or "Shall vote, or attempt to vote, in or upon the name of any other person, living or dead, or in or upon any assumed or fictitious name, or in or upon any name not his own;"

Or "Shall knowingly, wilfully or fraudulently, vote more than once for any candidate for the same office, except as authorized by law;"

Or "Shall vote, or attempt or offer to vote, in any elec-

tion precinct without having a lawful right to vote therein, or vote more than once, or vote in more than one election precinct, or, having voted once, shall vote, or attempt to vote again;"

Or "Shall knowingly, wilfully or fraudulently do any unlawful act to secure a right or opportunity to vote for himself or for any other person to vote;"

Or "Shall by force, threat, menace, intimidation, bribery or reward, or offer or promise thereof, or otherwise unlawfully, either directly or indirectly, influence or attempt to influence any elector in giving his vote;"

Or "Prevent or hinder, or attempt to prevent or hinder, any qualified voter from freely exercising the right of suffrage;"

Or "By any such means induce, or attempt to induce, any such voter to exercise any such right."

The punishment here is imprisonment for not less than two years; it may be for life.

Frauds at Elections, and Penalties.—Law of 1895.

In the act of 1895, Section 7335, is the one defining offenses at elections, making them fellonies punishable by imprisonment in the penitentiary for **not less than two nor more than five years.** The penalties in this section are against any person who

"Shall falsely impersonate any elector, or other person, or vote or attempt or offer to vote in or upon the name of such elector or other person;"

Or "Shall vote or attempt to vote in or upon the name of any other person, whether living or dead, or in or upon any false, assumed of fictitious name, or in or upon any name not his own;"

Or "Shall knowingly, wilfully or fraudulently vote more than once for any candidate for the same office, except as authorized by law;"

Or "Shall vote or attempt or offer to vote in any election precinct without having the lawful right to vote therein;"

Or "Vote more than once, or vote in more than one elec-

tion precinct, or, having once voted, shall vote or attempt or offer to vote again;"

Or "Shall knowingly, wilfully or fraudulently do any unlawful act to secure a right or an opportunity to vote for himself or for any other person to vote;"

Or "Shall by force, threat, menace, intimidation, bribery or reward, or offer or promise thereof; or otherwise unlawfully, either directly or indirectly, influence or attempt to influence any elector in giving his vote;"

Or "Prevent or hinder or attempt to prevent or hinder any qualified voter from freely exercising the right of suffrage;"

Or "By any such means induce, or attempt to induce, any voter to exercise any such right;"

Or "Who shall, by any such means, or otherwise, compel or induce, or attempt to compel or induce, any judge of election, or other officer, in any election precinct, to receive the vote of any such not legally qualified or entitled to vote at said election in said precinct;"

Or "Shall knowingly, wilfully or fraudulently interfere with, delay or hinder in any manner any such judge of election, poll clerk, or other officer of election in the discharge of his duties;"

Or "By any such means, or other unlawful means, knowingly, wilfully or fraudulently counsel, advise, induce or attempt to induce any judge of election, poll clerk or other officer of election whose duty it is to ascertain, proclaim or announce the result of any such election, to give or make any false certificate, document, report, return or other false evidence in relation thereto;"

Or "To refuse or neglect to comply with his duties or to violate any law regulating the same, and to receive the vote of any person in any election precinct not entitled to vote therein, or to refuse to receive the vote of any person entitled to vote therein;"

Or "Shall aid, counsel, advise, procure or assist any voter, judge or other officer of election, or any person whomsoever, to do any act by law forbidden, or in the act constituted an offense."

Frauds at Elections, and Penalties.—General Statutes.

The General Statutes of the State, under the head of "Crimes and Punishments" (see Vol. 1, Revised Statutes, 1899, Chapter 15, Article VI. page 597), contain the general law on the subject of intimidation of voters, and Section 2110 is as follows:

"If any person by menaces, threats, force, or by any other unlawful means, either directly or indirectly, attempts to influence any qualified voter in giving his vote, or to deter him from giving the same, or disturb or hinder him in the free exercise of his right of suffrage at any election held under the Constitution or law of this State, the person so offending shall, on conviction thereof, **be adjudged guilty of a misdemeanor.**"

Under the same chapter (Section 1990), it is enacted that

"Every person who shall be convicted of a misdemeanor as prohibited by this chapter, the punishment for which if not herein prescribed, shall be punished by imprisonment in the county jail not exceeding one year, or by a fine not exceeding $500, or by both such fine and imprisonment."

Section 2111 of the same Article and Chapter of the General Statutes provides that;

"Any person who designedly gives a printed or written ticket to any qualified voter in this State, containing written or printed names of persons for whom said voter does not design to vote, for the purpose of causing any such voter to poll his vote contrary to his own wishes, shall, on conviction, be adjudged guilty of a misdemeanor."

While Section 7345 of the Act of 1895 makes this a felony punishable by not less than two nor more than five years imprisonment in the penitentiary.

And Section 2111 of Article VI., Chapter 15, of the General Statutes, provides that

"Every person who shall, at any election held in pursuance of the laws of this State, or of any city or other

municipality thereof, vote more than once, either at the same or a different place, or shall knowingly cast more than one ballot, or shall vote at any such election, knowing that he is not qualified as a voter and is not entitled to vote, or every person who shall knowingly advise or procure any person to vote, who is not entitled to vote, or who shall knowingly advise or procure any illegal vote to be cast at any such election, shall be deemed guilty of a felony and, upon conviction, shall be imprisoned in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine not exceeding $50; or by both such fine and imprisonment."

And Section 2115 of same Chapter and Article of the General Statutes provides that

"Every person who shall attempt to vote at any election held in pursuance of the laws of this State in any city or municipality thereof, knowing he is not entitled to vote at such election, shall be deemed guilty of a misdemeanor."

Offenses of Officers.—Nesbit Law.

Section 41 of the Nesbit law provides that every election commissioner, deputy election commissioner, judge of election, clerk, canvasser or other officer authorized to take part in or perform any duty in relation to any canvass, or furnish statement of the vote cast at any election in any precinct or in any city, who shall make any false canvass of such votes, or shall make, sign, publish or dedeliver any false return of such election, or any false certificate or statement of result of such election, or who shall deface, destroy or conceal any statement, tally or certificate entrusted to his care or custody, shall, on conviction, be adjudged guilty of a felony and punished by imprisonment in the penitentiary for not less than two years. No limitation, or maximum, is fixed.

Offenses by Offfcers.—Law of 1895.

Sections 7336, 7337 and 7338 of the law of 1895 make the same acts when done by any officer connected with regis-

tration or elections, or the canvassing of returns, as well as any officer committing any one of numerous other acts specified in the sections, on conviction, guilty of a felony punishable by imprisonment in the penitentiary for not less than two nor more than five years.

Offenses by Officers.—General Statutes.

Sections 2116 and 2117 of the Revised Statutes, being a part of the general law, in Chapter 15, Article VI., before referred to, which cover frauds and offenses by judges and clerks of election, and other persons connected with the election, or in relation to the count of the ballot, or the canvass of the result of the election, upon conviction, liable to punishment "by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not less than three months and by a fine not less than $100, or by both such fine and imprisonment, and shall also be forever prohibited from voting at any election and from holding any office or position of trust or emolument under the authority of this State or any department thereof, or of any county, city or town therein, either by election or appointment, or as clerk or employe," while Section 2118 makes it a misdemeanor for judges and clerks of election to wilfully neglect or refuse or omit to perform any duty enjoined or required of them by law.

Offenses under Nesbit Law and Law of 1895.

Section 42 of the Nesbit law (Transcript, page 58) punishes any person, other than the judge of election, for putting fraudulent ballots in the ballot box, or putting any ballots therein not voted by lawful voters, or removing any lawful ballots, defacing any ballots, by imprisonment in the penitentiary not exceeding two years, while Section 7342 of the law of 1895 makes the same offenses punishable by imprisonment in the penitentiary for not less than two nor more than five years.

25591

In general, the law of 1895 denounces many more acts against the elective franchise than does the Nesbit law, making some of them felonies punishable by imprisonment in the penitentiary for a term of not less than two nor more than five years, some of them by imprisonment in the county or city jail, or by fine, or both, whereas, the Nesbit law makes all of them felonies, punishable by imprisonment for not less than two years, and without limitation as to maximum punishment, except breaches of the peace and disorder at the polls, or electioneering at the polls, which are made misdemeanors and punishable by imprisonment for not less than thirty days nor more than one year in some cases, in others by imprisonment not less than ten nor more than ninety days, or by fine not less than $50 or more than $100, whereas, the General Statutes do not make these offenses at all.

We have thus, as we think, quoted in full, or given a fair abstract of such sections of the several laws as we deem material to this case.

On these facts, and on the law, Plaintiff in Error claims that he is entitled to a reversal of the judgment of the Supreme Court of the State of Missouri, and for that he prays.

ASSIGNMENT OF ERRORS.

I.

The act of the General Assembly of the State of Missouri, entitled "An act to provide for the registration of voters in cities now having or which may hereafter have 300,000 inhabitants or more; to provide for the creation of a Board of Election Commissioners, provide for its appointment, and define its duties; to govern elections in such cities, defining offenses, and providing penalties therefor, and to prescribe rules and regulations governing registration and elections therein, and to repeal all acts and parts of acts in conflict or inconsistent herewith," approved June 19, 1899, is in conflict with the First Section of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States, and denies to citizens of the United States within the jurisdiction of, and citizens of the State of Missouri, the equal protection of the laws.

II.

Said Act of June 19, 1899, denies to citizens of the United States who are inhabitants and citizens of the City of St. Louis, and within the jurisdiction of the State of Missouri, the equal protection of the laws.

III.

The decision of the Supreme Court of the State of Missouri in the above entitled case, in sustaining said act of June 19, 1899, as a valid and constitutional enactment, is a denial to the citizens of St. Louis and of this Plaintiff in Error, who are within the jurisdiction of the State of Missouri, of the equal protection of the laws, and of their privileges and immunities as citizens of the United States.

IV.

* * *

V.

* * *

VI.

* * *

VII.

* * *

VIII.

* * *

IX.

The Court erred in refusing to hold that Section 9 (5) of Article VIII. of the Constitution of the State of Missouri prescribed the methods under which registration laws could be passed in the State of Missouri as being mandatory, and directing the only method by which said registration laws could be passed.

X.

The Court erred in refusing to hold that the limitations of Section 5 of Article VIII. of the Constitution of the State of Missouri limited the Legislature to passing a general act for the registration of voters in all cities having over 100,000 inhabitants.

XI.

The Court erred in refusing to hold that Section 5 of Article VIII. of the Constitution of the State of Missouri created a constitutional classification in cities and counties for registration purposes: (1) into cities and counties of over 100,000 population, without regard to the maximum limit in which cities and counties there must be registration; (2) cities of over 25,000 and under 100,000 population, in which there may be registration; and (3) the rest of the State, in which there shall be no registration; and

that said section was a mandatory rule controlling the action of the Legislature and requiring it to pass general laws on the subject of registration applicable to all cities in the State containing over 100,000 inhabitants.

XII.

* * *

XIII.

* * *

XIV.

The Court erred in holding that in the face of Section 5 of Article VIII. of the Constitution of Missouri the Legislature could make special laws for registration purposes applicable to the City of St. Louis, having 300,000 or more inhabitants, alone.

XV.

* * *

XVI.

The Court erred in holding that the "Nesbit bill" repealed the act of May 31, 1895, so far as regards cities covered by said "Nesbit bill," and having more than 300,000 inhabitants, leaving the act of May 31, 1895, in force as to cities having 100,000 inhabitants or more, up to 300,000 inhabitants, thereby creating a different rule of registration as to some of the cities in the State of Missouri having over 100,000, from the rule of registration prescribed for the City of St. Louis.

XVII.

* * *

XVIII.

The Court erred in holding that the act of May 31, 1895, was repealed so far as concerns the "Nesbit act," thereby holding that said act of May 31, 1895, as amended

by the "Cardwell act," applies to cities of over 100,000 and up to 300,000 inhabitants, in face of the fact that this ruling is contrary to the First Section of the Fourteenth Amendment to the Constitution of the United States, plead in the returns of the Respondent and urged by his counsel in their brief and on oral argument, and again presented to the Court on a motion for rehearing herein, for the reason that by Section 9 of the act of May 31, 1895, judges and clerks of election are to be appointed by a Board of Election Commissioners and reported to the Circuit Court of the State for confirmation, with the right to any interested citizen to file objection to such judges and clerks, which objections were to be heard and determined by the Court on a day fixed for that purpose, whereas by Section 8 of the Nesbit act the Board of Election Commissioners are empowered to appoint four judges of election and two clerks, without any supervision whatever, and with no right to the citizens of St. Louis to object thereto or to be heard thereon before any court or judicial body; and, further, that Section 31 of the act of May 31, 1895, makes provisions for any voter whose name is refused registration or who is stricken from the registration list to apply to the Circuit Court for reinstatement or registration, which application is to be heard summarily and determined by the Court, and if found qualified the name is placed upon the registry list, and if refused the applicant is given the right of appeal to the Supreme Court or the Court of Appeals of the State; whereas, under the Nesbit act, by Section 21, the Board of Election Commissioners is made the Board of Appeal to hear applications for reinstatement and registration, and no appeal whatever to the Courts is provided, and every citizen of St. Louis is denied his day in Court; all of which is contrary to the said Fourteenth Amendment to the Constitution of the United States; and, further, that other differences between the said Nesbit act and

the Act of May 31, 1895, apparent upon comparison of the two acts, will show that the citizens of cities and counties of the State of Missouri having 300,000 or more inhabitants, are denied equal protection by the laws provided for cities having 100,000 up to 300,000, and their privileges and immunities as citizens of the United States are abridged, notwitstanding the provisions of Section 5 of Article VIII. of the Constitution of Missouri, providing for registration in cities and counties having a population of over 100,000, and notwithstanding Section 3 (53) of Article IV. of the Constitution of Missouri, providing that in all other cases where general laws can be made applicable no local or special law shall be enacted, and whether the general law could have been made applicable in any case is declared to be a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject.

XIX.

* * *

XX.

* * *

XXI.

* * *

XXII.

* * *

XXIII.

* * *

XXIV.

The Court erred in overruling the motion for rehearing filed by Plaintiff in Error, which should have been sustained for the reasons in said motion for rehearing set out.

POINTS AND AUTHORITIES.

I.

A Federal question is raised in the return, motion for rehearing, and assignment of errors.

Session Acts Mo. 1895, pp. 5 to 43, inclusive;
Rev. Stat. Mo. 1899, vol. 2. p. 1443 *et seq.*;
Nesbit Act, Session Acts Mo. 1899, p. 179;
Constitution of Mo., Art. VIII, Sec. 5;
Kentucky R. R. Tax Cases, 115 U. S. 321–336;
Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232–6.
Dewey v. Des Moines, 173 U. S. 193.

II.

A Federal question arises on the decision of the State Supreme Court.

Virginia v. Rives, 100 U. S. 313–318;
Ex parte Virginia, 100 U. S. 339–346;
Constitution of Mo., Art. VIII, Sec. 5;
Constitution of Mo., Art. VIII, Sec. 2.

III.

On this question the United States Supreme Court is not bound by the State Court.

Yick Wo v. Hopkins, 118 U. S. 356–65;
Atchison, etc., Co. v. Mathews, 174 U. S. 96;
Carter v. Texas, 177 U. S. 422–47;
Boyd v. Thayer, 143 U. S. 135;
Taylor v. Beckham, advance sheets of opinions of Supreme Court U. S., No. 16, p. 891.

IV.

The Fourteenth Amendment protects the right of suffrage and requires equal protection of the laws.

Yick Wo v. Hopkins, 118 U. S. 356, 370, 373;
State *ex rel.* v. Conner, 22 Neb. 265;
State *ex rel.* v. Tuttle, 53 Wis. 45;
Kinser v. Wells, 144 Mass. 497;

Monroe v. Collins, 17 Ohio St. 666;
State *ex rel.* v. Williams, 5 Wis. 308;
Page v. Allen, 58 Pa. St. 338;
Payne on Elections, Sec. 340;
U. S. v. Cruikshank *et al.*, 92 U. S. 542–54–55;
Ex parte Yarbrough, 110 U. S. 651–65;
Barbier v. Connolly, 113 U. S. 27–31;
Holden v. Hardy, 169 U. S. 366–389;
Maxwell v. Dow, 176 U. S. 581;
In re Kemler, 136 U. S. 436–48.

V.

The Nesbit law denies equal protection of the laws as to registration and elections, in that it is unfair and partisan.

It is unequal as to punishments.

State v. Walsh, 36 Mo. 400–7;
State v. Thomas, 138 Mo. 95;
State v. Burkhardt, 144 Mo. 83;
In re Jilz, 3 Mo. App. 243;
Owen v. Baer, 55 S. W. Rep. 650;
Pace v. Alabama, 106 U. S. 16;
Caldwell v. Texas, 137 U. S. 691.

VI.

The Nesbit law is unconstitutional because it contravenes the classification of Article VIII., Section 5 of the State Constitution and denies equal protection of the laws.—Rules of Construction.

Mo. Constitution, Art. VIII, Sec. 5;
Ewing v. Hoblitzelle, 85 Mo. 64–72;
Kansas City, etc., v. Scarritt, 127 Mo. 642.

(*a*) The whole instrument will be considered.

Wilcox v. People, 90 Ill. 186;
Morley v. State, 7 Mo. 135;
Lastro v. State, 3 Tex. App. 363;
Rasmussen v. Baker, 50 Pa. 819;
Endlich on Statutes, Sec. 533;
Cooley Const. Lim., p. 78;

Monroe v. Collins, 17 Ohio St. 666;
State *ex rel.* v. Williams, 5 Wis. 308;
Page v. Allen, 58 Pa. St. 338;
Payne on Elections, Sec. 340;
U. S. v. Cruikshank *et al.*, 92 U. S. 542–54–55;
Ex parte Yarbrough, 110 U. S. 651–65;
Barbier v. Connolly, 113 U. S. 27–31;
Holden v. Hardy, 169 U. S. 366–389;
Maxwell v. Dow, 176 U. S. 581;
In re Kemler, 136 U. S. 436–48.

V.

The Nesbit law denies equal protection of the laws as to registration and elections, in that it is unfair and partisan.

It is unequal as to punishments.

State v. Walsh, 36 Mo. 400–7;
State v. Thomas, 138 Mo. 95;
State v. Burkhardt, 144 Mo. 83;

Add on page 46, at end of Point V.:

Barbier v. Connolly, *supra.*
Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 236.

VI.

The Nesbit law is unconstitutional because it contravenes the classification of Article VIII., Section 5 of the State Constitution and denies equal protection of the laws.—Rules of Construction.

Mo. Constitution, Art. VIII, Sec. 5;
Ewing v. Hoblitzelle, 85 Mo. 64–72;
Kansas City, etc., v. Scarritt, 127 Mo. 642.

(*a*) The whole instrument will be considered.

Wilcox v. People, 90 Ill. 186;
Morley v. State, 7 Mo. 135;
Lastro v. State, 3 Tex. App. 363;
Rasmussen v. Baker, 50 Pa. 819;
Endlich on Statutes, Sec. 533;
Cooley Const. Lim., p. 78;

State v. Pottman, 98 N. C. 660;
Bd. of Com. v. Coler, 96 Fed. 284;
Mo. Const., Art. IV, Secs. 1–53, Art. IX, Secs. 2–16–17–20–21–22–23.

(*b*) An affirmative enactment implies a negative of what is not included or different.

Sutherland on Stat. Const., Sec. 14;
Wells v. Supervisors, 102 U. S. 635;
Chandler v. Horn, 83 Ala. 390;
Ex parte v. Joffer, 46 Mo. App. 360;
Cooley Const. Lim., pp. 78–79;
Thomas v. Owens, 4 Md. 189;
Matter of Dorsey, 7 Port. 293;
Rison v. Farr, 24 Ark. 161;
People v. Raymond, 37 N. Y. 428;
People v. Sibertson, 55 N. Y. 50;
State v. Goldstocker, 40 Wis. 124;
People v. McKinney, 52 N. Y. 374.

(*c*) Directions given as to time or modes of proceeding must be followed.

Cooley Const. Lim., p. 94;
Varney v. Justice, 86 Ky. 506;
State v. Johnston, 26 Ark. 281;
Wolcott v. Wigton, 7 Ind. 44;
Conner v. Mathes, 8 Heisk. 504;
Life Assn. v. Board Ass'rs., 49 Mo. 512;
State v. Duncan, 28 Wis. 541;
Sutherland on Stat. Const., Sec. 66;
Ibid, Sec. 454 and notes;
Page v. Allen, 58 Pa. St. 238.

(*d*) General terms are limited by particular recitals.

Miller v. Wagonhausen, 18 Mo. App. 14;
Grumley v. Webb, 44 Mo. 444;
Dart v. Bagley, 110 Mo. 42;
Hall v. Schoenecke, 128 Mo. 661;
Roter v. Gabbert, 123 Mo. 21.

(*e*) Words of Constitutions should never be regarded as directory.

Varney v. Justice, 86 Ky. 596;
People v. Dettenthaler, 77 N.W. 450.

(*f*) Expression of one thing excludes others.

Page v. Allen, 58 Pa. St. 338;
Hall v. Schoenecke, 128 Mo. 661-8;
State *ex rel.* v. Foster, 119 Mo. 344;
Denman v. Broderick, 111 Cal. 46.

VII.

The classification by the State Court is unreasonable and arbitrary.

State v. Pond, 93 Mo. 606;
State v. Miller, 100 Mo. 439, 448.
Safe Dep. Co. v. Fricke, 152 Pa. St. 231;
Ayers App. 122 Pa. St. 281;
In Ruon St. 132 Pa. St. 273;
Commonwealth v. Patton, 85 Pa. St. 258;
Lloyd v. Smith, 176 Pa. St. 213;
Newman v. City of St. Louis, 123 Mo. 479;
St. Louis v. Dow, 145 Mo. 466, 475;
Mo. Const., Art. IX, Sec. 7;
Ibid, Art. IX, Secs. 20, 25;
Owen v. Baer; 55 S. W. Rep. 644.

VIII.

This arbitrary classification is contrary to the Fourteenth Amendment.

Gulf Co. v. Ellis, 165 U. S. 150;
State v. Loomis, 115 Mo. 307-14;
Atchison v. Mathews, 174 U. S. 96;
Maxwell v. Dow, 176 U. S. 581;
Johnson v. Goodyear Mfg. Co. 47 L.R.A. 338;
Wilkinson v. Lewis, 101 U. S. 22.

ARGUMENT.

I.

A federal question is Raised in the Return, Motion for Rehearing and Assignment of Errors.

The Respondent below, Plaintiff in Error in this case, in his return to the alternative writ of mandamus, specifically pleads Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that the act in question, approved June 19, 1899, and called herein the Nesbit law, violated and was in conflict, not only with the provisions of the State Constitution, specifically set out in said return, but was in conflict with the Fourteenth Amendment to the Constitution of the United States, in that it deprived citizens of the United States, residing in the City of St. Louis, of their right to the equal protection of the laws, and imposed upon citizens of said city unconstitutional requirements as preliminary to their right to vote and hold office, and is null and void. The return also pleaded the Fifth Section of Article VIII. of the Constitution of Missouri; and that the General Assembly of the State, by virtue of the authority of said provisions of the Constitution, passed an act entitled "an act to create a Board of Election Commissioners in cities now having or which may hereafter have over 100,000 inhabitants; to provide for the appointment of the same; to define the duties of such Board; to provide for the registration of all voters in such cities; to govern elections therein; defining offenses and providing for punishment thereof; prescribing penalties for violating the provisions of this act, and abolishing the office of Recorder and Deputy Recorder of Voters;" that this act was approved by the governor May 31, 1895, and took effect and was of force August 25, 1895. (Session Acts of Missouri 1895, pp. 5 to 43 inclusive; also Rev. Stat. Mo. 1899, Vol. 2, pages 1443 *et seq.*): that under this law a

Board of Election Commissioners was duly appointed for the City of St. Louis, whose terms have not expired, nor have any successors been appointed or qualified for or to either of them, and that this law of May 31, 1895, "is the only law of this State providing for the registration of all voters in cities and counties of this State having a population of more than 100,000 inhabitants; and is now and since its taking effect has been in full force and effect, and applies to said City of St. Louis, etc., etc." (Trans., p. 32.): and further, that this law of May 31, 1895, and its amendments is the only law relating to and governing registration and elections in said City of St. Louis, and the City of St. Louis is and will be liable only for salaries and expenditures of commissioners who are appointed and have qualified thereunder. The return then refers to the repealing clause, Section 49 of the Nesbit act, which attempts to repeal the act of May 31, 1895, by name, and to the passage of the "Cardwell" amendment on the same day of the alleged passage of the Nesbit act, to-wit, June 19, 1899, and avers that the same are so inconsistent with each other that neither can take effect, and that the act of May 31, 1895, with its amendments, is the only law now in force and effect in this State relative to the appointment of election commissioners for cities of over 100,000 population, to which class of cities the City of St. Louis belongs. (Trans., p. 33.)

The Supreme Court of Missouri in its opinion denies this defense, quoting the constitutional qualifications for voters in Missouri and the election laws of other States and holding that it was entirely competent for the Legislature to regulate registration and the conduct of elections (Trans., pp. 160–1–2); and against the proposition that the law denied the equal protection of the law to voters in St. Louis cited the case of Missouri v. Lewis, 101 U. S. 22, to show that the State could adopt any system of judicature it sees fit for all or any part of its territory (Trans., p.

162). The State Supreme Court further, in the present case, held as follows: "Respondent further contends that inasmuch as the Nesbit law professedly repeals the act entitled 'An act to create a Board of Election Commissioners approved May 31, 1895,' and this act is approved June 19, 1899, and what is known as the Cardwell act, in relation to cities having over 100,000 inhabitants, which purports to amend said act of May, 1895, was approved also on June 19, 1899, that, therefore, the repeal of the act (of 1895) aforesaid was not accomplished. In reference to this it is enough to say that the Cardwell act is not before us for adjudication. That so far as concerns the Nesbit act it does repeal the act of 1895." Thus the State Supreme Court practically holds that the Nesbit act applies to cities having 300,000 inhabitants and over, and that the act of May 31, 1895, applies to cities having 100,000 inhabitants and over up to 300,000 inhabitants; and thereby the State Supreme Court, we here maintain, creates different laws for St. Louis from those applicable to Kansas City and St. Joseph (they being the only cities having over 100,000 inhabitants), in direct contravention of Article VIII., Section 5, of the Constitution of Missouri, which provides "The General Assembly shall provide by law for the registration of all voters in cities and counties having a population of more than 100,000 inhabitants, and may provide for such registration in cities having a population exceeding 25,000 inhabitants and not exceeding 100,000, but not otherwise." (Trans., p. 29.)

Respondent made this judicial construction of the Constitution and laws of Missouri (which is so clearly a violation of the Fourteenth Amendment to the Constitution of the United States) a ground of error in his motion for rehearing (Trans., p. 65) and specifically pointed out the differences between the Nesbit law and the law of May 31, 1895, which constitute violations of said Fourteenth Amendment to the Constitution of the United States

(Trans., pp. 169-170), and showed that the citizens of the only city of the State of Missouri having 300,000 or more inhabitants are, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in violation of it, denied the equal protection of the laws provided for cities having 100,000 inhabitants and not exceeding 300,000, and that thereby their privileges and immunities as citizens of the United States are abridged, contrary to said Fourteenth Amendment, and notwithstanding the provisions of Section 5, Article VIII., of the Constitution of Missouri, and notwithstanding that Section 53 of Article IV. of the same Constitution provides that "In all other cases where a general law can be made applicable no local or special law shall be enacted, and whether a general law could have been made applicable in any case, is hereby declared a judicial question, and as such, shall be judicially determined, without regard to any legislative assertion on that subject."

This motion for rehearing set forth in detail the provisions of the Constitution of the State of Missouri and of the United States, which respondent maintained the Supreme Court of Missouri violated in its decisions in this case (Trans., pp. 165 to 170). In the assignment of errors all of these objections were reasserted and preserved.

The Federal question is thus distinctly and legally raised in the present case, as appears from the following cases:

In the Kentucky Railroad Tax Cases, 115 U. S. 321, 336, the Court says: "The plaintiffs in error, however, did interpose a defence below, legitimate in itself, and arising under the Constitution of the United States, namely, that in the proceedings of the Board of Railroad Commissioners, resulting in the valuation and assessment, under the act of April 3, 1878, they were severally denied the equal protection of the laws, contrary to the Four-

teenth Amendment to the Constitution. As this defense was overruled by the Court of Appeals of Kentucky, another Federal question is presented which we are bound now to examine and decide."

In Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, 236, the Court says: "It cannot be denied that the plaintiff in error, in its appeal and specifications of objections to the tax, did raise a question under the Constitution of the United States. That question remained in the record as the foundation of the proceedings in the court, and, whether adverted to or not, was necessarily involved in the final decision of the case. We think it clear, therefore, that the writ of error cannot be dismissed."

In the case of Dewey v. Des Moines, 173 U. S. 193, it is said, page 199: "Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the State Court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the Court while not noticing the question was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law. Roby v. Colehour, 146 U. S. 153; Chicago, etc., Railroad v. Chicago, 166 U. S. 226; Green, etc., Co. v. Patten Paper Company, 172 U. S. 58; Capital, etc., Bank v. First N. Bank, 172 U. S. 425."

It is further said in this same case: "Parties are not confined here to the same arguments which were advanced in the courts below on a Federal question there discussed. This Court must be able to see clearly, from the whole record, that a provision of the Constitution or act of Congress is relied upon by the party who brings

this writ of error, and that the right thus claimed by him was denied."

II.

A federal question arises on the decision of the State Supreme Court.

It will be seen from the above citations that the question of the violation of the Fourteenth Amendment to the Constitution of the United States by the denial of the equal protection of the laws has been in this record from the beginning. It arises not only from the enactment of the statute in controversy itself by the Legislature of Missouri, but this statute becomes more pronounced and clearly violative of the Constitution of the United States by the construction given by the Supreme Court of Missouri to the Constitution of that State in reference to this Nesbit law. The First Section of the Fourteenth Amendment to the Constitution of the United States reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

While the prohibition is against State action, it includes action by the executive, legislative or judicial officers of the State.

In the case of Virginia v. Rives, 100 U. S. 313, the Court says, page 318, commenting on this Fourteenth Amendment, "It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions

of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the Fifth Section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial department of the State. The mode of enforcement is left to its discretion. * * * But the violation of the constitutional provisions, when made by the judicial tribunals of a State, may be, and generally will be, after the trial has commenced. It is then, during or after the trial, that denials of a defendant's right by judicial tribunals occur. Not often until then. Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly until then he cannot affirm that it is denied, or that he cannot enforce it, in the judicial tribunals."

In *ex parte* Virginia, 100 U. S. 339, the Court says, on page 346: "We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are 'No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the laws.' They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the consti-

tutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it."

It is against the action of the State toward persons within its jurisdiction that this prohibition is directed; it has no reference to equality of right as between citizens of different States, it does not mean that the same laws and rights must prevail throughout the Nation—equality of right under the constitution and laws of each State, as between the people of that State, is the end and aim of this amendment, which, after all, is practically the embodiment in the Constitution of the principle announced in the Declaration of Independence that "all men are created equal."

It is clear, then, that if the decision of the Supreme Court of the State of Missouri, declaring the Nesbit law to be the law for St. Louis, and the law of May 31, 1895, to be the law for Kansas City and for St. Joseph, thereby denied to the resident voters of St. Louis, both as citizens of the State and of the United States, the equal protection of the laws, then this Court is bound to reverse that judgment.

In the case of Fallbrook Irrigation District v. Bradley, 164 U. S. 112, the Court says, page 154, speaking of the jurisdiction of the United States Circuit Court: "In exercising that jurisdiction it was nevertheless the duty of the trial court to follow and be guided by the decisions of the highest State court upon the construction of the statute, and upon the question whether as construed the statute violated any provision of the State Constitution. The same duty rests upon this Court, and it has been so determined from the earliest period of its history. If the act of the State Legislature as construed by its highest court conflicts with the Federal Constitution or with any valid

25600

act of Congress, it is the duty of the Circuit Court and of this Court to so decide, and to thus enforce the provisions of the Federal Constitution. The following are some of the numerous cases in which this principle has been announced and carried into effect: Shelby v. Guy, 11 Wheat. 361; Nesmith v. Sheldon, 7 How. 812; Van Rensselaer v. Kearney, 11 How. 297; Webster v. Cooper, 14 How. 488; Leffingwell v. Warren, 2 Black 599; Hagar v. Reclamation District No. 108, 111 U. S. 701; Detroit v. Osborne, 135 U. S. 492."

We contend not only that the Nesbit law deprived the citizens of the United States residing in St. Louis of the equal protection of the laws, and that the construction given to that act by the Supreme Court of Missouri denied said citizens the equal protection of the law, but that the construction of the State Supreme Court of the provisions of the Constitution of the State of Missouri, and particularly of Article VIII., Section 5, herein above quoted, denied such citizens the equal protection of the laws.

It has frequently been held by this Court that the right to vote is not a right created or confirmed by the Constitution of the United States, but comes from the State. Nor is it a natural right. This right is conferred by the Constitution of Missouri in the most complete and absolute manner by Section 2 of Article VIII. "Every male citizen of the United States, and every male person of foreign birth, who may have declared his intention, * * * who is over the age of 21 years, possessing the following qualifications, shall be entitled to vote at all elections by the people:

"First. He shall have resided in the State one year," etc.

"Second. He shall have resided in the County, City, etc., at least sixty days," etc.

The right is only subject to the Fifth section of the same article authorizing the enactment of registration laws.

Thus conferred, it is entitled to protection as fully as a natural right or any right of property or person. The

right of every elector of Missouri to the benefit of this is therefor under the protection of this Court, by virtue of the Fourteenth Amendment.

It must be remembered also that, under the laws of Missouri, all electors residing in St. Louis to whom the State of Missouri has given the right of suffrage by the provisions of its Constitution and laws are electors not only for State officers, but for members of the National House of Representatives and for President and Vice-President of the Nation, and that while the State divides its territory into Congressional Districts, a vote for President and Vice-President of the United States, or rather for Presidential Electors, is on a general ticket throughout the State of Missouri. Citizens of the United States residing in St. Louis are therefore entitled to the protection not only of the registration and election laws but to the protection of the provisions of the Constitution of the State of Missouri equally with other citizens of said State; and if a construction of that Constitution by the Supreme Court of the State denies them the equal protection of that Constitution, it is an infringement of a right secured by the Fourteenth Amendment to the Constitution of the United States. Of course, ultimately the question of the unconstitutionality of the law arises on the law itself, but the law is so inseparably connected with the provisions of the Constitution of the State under which it was passed that the construction of the two together must cause a certain result, and if that result is a denial of the equal protection of the Constitution and laws of the State to any person or class of persons in the State or any part of it, the law violates the Constitution of the United States.

III.

On this question the United States Supreme Court is not bound by the State Court.

This question is one which this Court will decide for itself, and is not to be bound by the decision of the State

Court, for it involves the Federal question of whether the Constitution of the United States is violated.

In the case of Yick Wo v. Hopkins, 118 U. S. 356, the Court, through Mr. Justice Matthews, said, on page 365: "In the case of the petitioner, brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question whether the plaintiff in error has been denied a right, in violation of the Constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal, under the Constitution and laws of the State, is not open to us. And although that question might have been considered in the Circuit Court in the application made to it, and by this Court on appeal from its order, yet judicial propriety is best consulted by accepting the judgment of the State Court upon the points involved in that inquiry.

"That, however, does not preclude this Court from putting upon the ordinances of the supervisors of the County and City of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.

"We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question." The Court then takes up the ordinances, discusses them in detail, and holds that the discrimination against the petitioners was illegal, and that the public administration which enforced it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment to the Constitution. (Page 374.)

In the case of Atchison, etc., Co. v. Matthews, 174 U. S. 96, the Court, through Mr. Justice Brewer, referring to

the construction by the Texas Supreme Court of a law requiring railroads, in cases of damage by fire, to pay the plaintiff, if he recovers, a reasonable attorney's fee, says, page 100: "This Court is not concluded by the opinion of the Supreme Court of the State. Yick Wo v. Hopkins, 118 U. S. 356, 366. It forms its own independent judgment as to the scope and purpose of a statute, while, of course, leaning to any interpretation which has been placed upon it by the highest court of the State. We have referred to the interpretation placed upon the respective statutes of Texas and Kansas by their highest courts, not as conclusive, but as an interpretation toward which we ought to lean, and which, in fact, commends itself to our judgment."

In the case of Carter v. Texas, 177 U. S. 422, the Court, through Mr. Justice Gray, says, page 447: "But the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a State court is itself a Federal question, in the decision of which this Court, on writ of error, is not concluded by the view taken by the highest court of the State. Neal v. Delaware, 103 U. S. 396; Mitchell v. Clark, 110 U. S. 633; Boyd v. Thayer, 143 U. S. 135."

In the case of Boyd v. Thayer, 143 U. S. 135, the Court, speaking through Mr. Chief Justice Fuller, in regard to the answer of the respondent, showing that his father had made a declaration of intention to become a citizen of the United States and that his father had, for 42 years, enjoyed all the rights, immunities and privileges, and discharged all the duties of a citizen of the United States, etc., and had completed his naturalization in strict accordance with the acts of Congress, etc., says, page 180: "As the allegation last quoted sets up a right and privilege claimed under the laws of the United States, this Court must determine for itself the question of the sufficiency

of this allegation, and is not concluded by the view taken of that question by the Supreme Court of Nebraska. In the words of Mr. Justice Miller, speaking for this Court: 'The question whether a plea sets up a sufficient defense, when the defense relied on arises under an act of Congress, does present, and that necessarily, a question of Federal law; for the question is and must be, does the plea state facts which under the act of Congress constitute a good defense?' "

The judgment of the Supreme Court of Nebraska in this case involving the right, as betwnen two persons, to the office of Governor of that State, was reversed.

In the recent case of Taylor *et al.* v. Beckham, Advance Sheets Opinions Supreme Court No. 16, p. 891, October Term, 1899, the Chief Justice delivering the opinion, this Court, while holding that where a case has been determined by the highest court of the State in accordance with the Constitution and laws of that State it will rarely interfere, yet, quoting from Boyd v. Thayer, *supra*, says: "Where the trial is in the courts, it is a 'case', and if a defense is interposed under the Constitution or laws of the United States, and is overruled, then, as in any other case decided by the highest court of the State, this Court has jurisdiction by writ of error." Quoting also from Wilson v. North Carolina, 169 U. S. 586, a case involving a right to a State office, the Court further says: "These rights are to be measured by the statute and by the Constitution of the State, **excepting in so far as they may be protected by any provision of the National Constitution.**" In the case at bar, the questions presented directly challenge the law of the State as violating the Federal Constitution, and challenge the decision itself as in contravention of that Constitution, and invoke that equal protection which, it is claimed, is within and is guaranteed by the National Constitution.

Assuming, then, that the record itself and the action of the Supreme Court of Missouri raise a Federal question and that the motion for rehearing preserves our exception to the action of the State Courts and that this Court is not bound by the decision of the Supreme Court of Missouri but can investigate the question itself, the way is clear to present the whole question to this Court.

The Fourteenth Amendment to the Constitution has been repeatedly construed by this Court and practically the decisions resolve themselves into this result, to-wit, that each case must stand on its own facts rather than be governed by specific general rules. As was said by this Court through Mr. Justice Bradley, in discussing the meaning and scope of the Fourteenth Amendment, in Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. at p. 237: "It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases."

IV.

The Fourteenth Amendment protects the right of suffrage and requires equal protection of the laws.

The case at bar involves one of the dearest rights of the American people—the right of suffrage.

In the case of Yick Wo v. Hopkins, 118 U. S. 356, this Court, through Mr. Justice Matthews, says, page 370: "But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living,

or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

"There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless, it is regarded as a fundamental political right, because preservative of all rights.

"In reference to that right, it was declared by the Supreme Judicial Court of Massachusetts, in Capen v. Foster, 12 Pick, 485, 489, in the words of Chief Justice Shaw, 'that in all cases where the constitution has conferred a political right or privilege, and where the constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power to adopt any reasonable and uniform regulations in regard to the time and mode of exercising that right which are designed to secure and facilitate the exercise of such right, in a prompt, orderly and convenient manner;' nevertheless, 'such a construction would afford no warrant for such an exercise of legislative power, as, under the pretense and color of regulating, should subvert or injuriously restrain the right itself.' It has accordingly been held generally in the States that whether the particular provision of an act of legislation, establishing means for ascertaining the qualifications of those entitled to vote, and making previous registration in lists of such a condition precedent to the exercise of the right, were or were not reasonable regulations, and accordingly valid or void, was always open to inquiry as a judicial question. See Daget v. Hudson, 1 Western Rep. 789, decided by the

Supreme Court of Ohio, where many of the cases are collected; Moore v. Collins, 17 Ohio St. 665."

On page 373 the same eminent Justice said: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this Court in Henderson v. Mayor, etc., 92 U. S. 259; Chy Lung v. Freeman, 92 U. S. 275; *Ex parte* Virginia, 100 U. S. 339; Neal v. Delaware, 103 U. S. 370; and Soon v. Crowley, 113 U. S. 703."

All regulations of the elective franchise must be reasonable, uniform and impartial. They must not have for their purpose, directly or indirectly, a denial or abridgement of the constitutional right of citizens to vote, nor unnecessarily impede its exercise. If they do, they must be declared void. Cooley Const. Lim., Sec. 616.

State *ex rel.* v. Conner, 22 Neb. 265;
State *ex rel.* v. Tuttle, 53 Wis. 45;
Kineen v. Wells, 144 Mass. 497;
Monroe v. Collins, 17 Ohio St. 666;
State *ex rel.* v. Williams, 5 Wis. 308;
Page v. Allen, 58 Pa. St. 338;
Payne on Elections, Sec. 340.

If Congress, in its wisdom, has declined to pass laws regulating national elections, leaving those matters to the fairness and impartiality of the State authorities, it becomes all the more important that this Court should enforce all constitutional provisions for the protection of the rights of voters who are the electors at such elections, and see that no unfair nor unjust nor oppressive registration or election laws shall be enforced, and that they shall be reasonable, uniform and impartial.

In the case of U. S. v. Cruikshank *et al.*, 92 U. S. 542, this Court, through Mr. Chief Justice Waite, discussing the Fourteenth Amendment, says, page 554: "The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty."

And, on page 555, the same learned Justice says: "In United States v. Reese *et al.*, *supra* (92 U. S.), p. 214, we held that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

In the case *ex parte* Yarbrough, 110 U. S. 651, this Court, through Mr. Justice Miller, said, page 665: "In the case of United States v. Reese, so much relied on by counsel,

this Court said in regard to the Fifteenth Amendment, that, 'it has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.' This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination."

We have already called attention to the fact that the right to vote is a right secured by the Constitution of Missouri to its citizens.

In further discussing the powers of the Government of the United States, the learned Justice, referring to the temptation to control elections by violence and corruption as a constant source of danger, ends his opinion in these words: "If the Government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other."

In the case of Barbier v. Connolly, 113 U. S. 27, this Court, through Mr. Justice Field, said, page 31: "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended

not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

See also to the same effect as to the general purpose and scope of the Fourteenth Amendment the case of Bell's Gap Ry. Co. v. Pennsylvania, 134 U. S. 232, by Mr. Justice Bradley, at page 238.

In the case of Holden v. Hardy, 169 U. S. 366, this Court, through Mr. Justice Brown, discussing the relation of the States to the Government, says, page 389: "While the people of each State may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a State. Thus, the United States are bound to guarantee to each State a republican form of government, and the Tenth Section of the First Article contains certain other specified limitations upon the power of the several States, the object of which was to secure to Congress paramount authority with respect to matters of universal concern. In addition, the

Fourteenth Amendment contains a sweeping provision forbidding the States from abridging the privileges and immunities of citizens of the United States, and denying them the benefit of due process or equal protection of the laws."

In the case of Maxwell v. Dow, 176 U. S. 581, this Court, through Mr. Justice Peckham, discussing the Fourteenth Amendment, quotes with approval the language of the Chief Justice *In re* Kennler, 136 U. S. 436, 448, as follows, page 593: "The Fourteenth Amendment did not radically change the whole theory of the relations of the State and Federal Governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty and property rests primarily with the States, and the amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the State governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the National Government, and granted or secured by the Constitution of the United States. United States v. Cruikshank, 92 U. S. 542; Slaughter-house cases, 16 Wall. 36."

It is clear from these decisions of this Court that it will restrain State legislatures from passing or State courts from construing laws so as to deny equal protection to the citizens of the State, and will enforce State constitutional limitations on the subjects of legislative power and of registration and elections which were meant for the protection of all the citizens of the whole State, and the more when, from the absence of legislation by Congress, the

method of exercising the elective franchise of a citizen, as a citizen of the United States, is left to the control of the States.

V.

The Nesbit law denies equal protection of the law as to Registration and Elections, in that it is unfair and partisan. It is Unequal as to Punishments.

We have set out in our statement, at pages 20 to 39, such features of the law as we deem material. Tested by the cases cited, we maintain that this Nesbit law does deny to the citizens of St. Louis the equal protection of the laws in these respects:

(*a*) It denies them the right of appeal to any court from the action of the Precinct Boards of Registration and from the action of the Board of Election Commissioners, in striking their names from the registration lists, as qualified voters, while in cities of 100,000 inhabitants and up to 300,000 inhabitants, under the provisions of the law of 1895, this right is secured. It is secured so completely by the last named law that an appeal lies even to the highest court of the State.

(*b*) It denies them the right of appeal to any court or judicial tribunal from the action of the Precinct Boards of Registration or from the action of the Election Commissioners in admitting to registration or in refusing to strike from the registration lists of qualified voters persons who are not entitled to register or to vote—a right secured to all citizens by the law of 1895 in cities and counties of 100,000 and not exceeding 300,000 inhabitants.

(*c*) It allows a partisan board to add hundreds and even thousands of names to the registration lists, which names are unknown to the voters till the day of election and have been subjected to no canvass as to their right to remain on the lists as registered qualified voters. If a citizen of St. Louis registers in his own precinct, under the

Nesbit law, or names are placed on the registration lists in the precinct by the Precinct Boards of Registration during the three days allowed by the law for registration in the precinct, the Nesbit law requires, as does the law of 1895, that the clerks, representing parties of opposite politics, shall go together to each house or room from which the party registers, and ascertain, by personal inquiry, whether or no the party registered actually resides at that place.

But if the party has registered at the office of the Board of Election Commissioners, which he may do on all such days on which registration is not conducted in the precincts, which days of precinct registration are the Tuesday four weeks before the election, the Saturday following, and the third Tuesday before the election, and which he may do even on the Thursday, Friday and Saturday immediately preceding the election—there is no canvass or examination whatever provided by the Nesbit law of his right to do so; his name is placed on the registration and poll-books by the Commissioners, their deputy or clerks—all appointed by vote of a majority of the Board—and it appears on the day of election as the name of a qualified voter of the precinct. Thus a marked distinction is made by the Nesbit law between those who register or have their names placed on the registration lists at the office of the Election Commissioners and those who register in their own precinct. The latter are subjected to close and bi partisan scrutiny; the former go unchallenged and uncontested. Under the law of 1895 this cannot occur, for no registration under that law can be made in the office of the Board of Election Commissioners, but all must be made in the several precints, and all is subject to rigid bi-partisan scrutiny and canvass. This latter is the law in all cities of 100,000 and up to 300,000 inhabitants, and the former is the Nesbit law for all cities—meaning St. Louis alone—of over 300,000 inhabitants.

(*d*) Under the Nesbit law the Judges and Clerks of Election for each precinct, who are also the registration and canvassing officers for those precincts, are all appointed by vote of a majority of the Board of Election Commissioners—a majority necessarily partisan. This majority selects them arbitrarily—true, the law says they shall be of "opposite politics"—but whether of opposite politics or not, whether fit persons or not, whether intelligent or not, is left to the uncontrolled, arbitrary and exclusive determination of the majority of the Board. This in St. Louis alone. In all other cities of 100,000 and up to 300,000 inhabitants "the Commissioner or Commissioners shall select the judges and clerks to represent the party **to which said Commissioner or Commissioners belong**," and the person selected shall be intelligent, educated, etc., and "shall be recognized members of the party from which selected." The names of those selected shall be filed in the Circuit Court and published, and any elector may file objections to the persons so selected and have his objections heard and determined by the court. If sustained, new names are submitted by the Commissioners until fit persons are secured; and that being done, the appointments made by the Commissioners are confirmed by the court. The court names no one; it only hears and passes on names objected to, and then confirms the approved appointees of the Commissioners.

(*e*) The Nesbit law is so partisan as to deny to all citizens in St. Louis, not members of the political party to which the two majority members of the Board belong, the equal protection of the law. This is apparent on the face of the law. In this respect it is in strong contrast with the law of 1895. In our statement we have set forth the leading features of the two laws and we will not repeat them here but refer to that statement in support of this proposition. Where a State recognizes political parties by its laws as

does the State of Missouri by numerous provisions, then it must do so equally for all—it must grant to all its citizens equality of right and protection—and this it has not done in the enactment of this Nesbit law; and in that has violated the Fourteenth Amendment to the Constitution of the United States. It has done this, not only as between St. Louis and all other cities of over 100,000 inhabitants, but in St. Louis itself it has made such distinction between parties in that city as to deprive all citizens of that city who are not members of the political party to which the majority of the Board belongs of the equal protection of the law.

(*f*) The Nesbit law involves a denial of the equal protection of the laws, in that it provides penalties which are different in degree and character for offenses than are prescribed for the same offenses by the law of 1895 and by the General Statutes of the State; that is, the same offense committed in the City of St. Louis is punished one way under the Nesbit law; if committed in Kansas City or St. Joseph or in any other city of 100,000 and not having 300,000 inhabitants it is punished in another way under the law of 1895; and if committed in the State at large, it is punished in yet another way under the General Laws. Furthermore, certain acts are crimes if committed in one locality in the State, but not so when committed in another.

This is directly contrary to many decisions of the Supreme Court of the State of Missouri.

In State v. Walsh, 36 Mo. 400, at page 407, the Court says: "In a word, it is quite beyond the power of the legislature to enact even a general law for the punishment of a crime all over the State, and then make that same criminal act non-punishable if perpetrated in certain favored localities." See also State v. Thomas, 138 Mo. 95.

In State v. Burkhardt, 144 Mo. 83, at page 84, the Court says: "Under our Constitution it is not permissible to punish the same offense for violation of some public or

general law by one species of punishment in one locality, and by a different and more heavy punishment in another locality in this State. A law inflicting such different penalties for the perpetration of any given crime cannot bear the test of judicial examination."

See also *In re* Jilz, 3 Mo. App. 243, decided January 25, 1877, in which it is said on page 246: "A law which should prescribe death as the punishment of murder in one county, and imprisonment as the penalty for the same crime in other parts of the State, would be void, because not operating equally upon all inhabitants of the State. The general law applicable to the State prescribes, as the punishment for the offense of which the petitioner was convicted, imprisonment in the county jail not exceeding one year, or fine not exceeding $500, or both such fine and imprisonment. (Wag. Stat. 450, Sec. 34.)

"A law prescribing a different punishment from this in St. Louis County is clearly unconstitutional."

In the case of Owen v. Baer, 55 S. W. Rep., page 650, the Supreme Court of Missouri, through Marshall, J., in summarizing the decision, says: "That the Supreme Court has decided that 'legislation in regard to a class of persons is proper, but a natural class cannot be split in two, and different rules enacted in each class.'" Citing State v. Walsh, 136 Mo. 400; State v. Thomas, 125 Mo. 95.

In Pace v. Alabama, 106 U. S. 16, the question of different punishments for the same crime was condemned, and the Court, by Mr. Justice Field, said: "The counsel is undoubtedly correct in his view of the purpose of the clause of the amendment in question that it was to prevent hostile and discriminating State legislation against any person or class of persons. Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others, to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be sub-

jected for the same offense to any greater or different punishment." (Caldwell v. Texas, 137 U. S. 691.)

(*g*) The law also imposes unconstitutional requirements on the citizens of St. Louis as requisite to the right to vote in that it provides that a voter shall have resided in his election precinct at least 20 days prior to the election and is not "directly interested in any bet or wager depending upon the result of the election." No such requirements are in Article 8 of the State Constitution: to enforce them on the citizens of St. Louis is for the Legislature to attempt to add tests to them not authorized by the State Constitution and not applied to the other citizens of this State.

VI.

The Nesbit law unconstitutional because it contravenes the classification of Article VIII., Section 5, State Constitution.— Rules of Construction.

The Plaintiff in Error contended before the Supreme Court of the State that the Nesbit law was unconstitutional because it expressly contravenes the classification of Article VIII., Section 5, of the Constitution of the State.

The first section of the Nesbit law is as follows: "Section 1. In all cities of this State now having, or which hereafter may have, 300,000 inhabitants, or more, there shall be a registration of all the qualified voters, and said registration and the mode of conducting the elections held in such cities shall be governed and controlled as provided herein, and be subject to all the provisions of the other election laws of this State, so far as the same are not inconsistent or in conflict herewith." (Trans., p. 40).

Article VIII., Section 5, of the Constitution of Missouri reads as follows: "The General Assembly shall provide by law for the registration of all voters in cities and counties having a population of more than one hundred thousand inhabitants, and may provide for such registration

in cities having a population exceeding twenty-five thousand and not exceeding

100,000 inhabitants and the power to pass such a law is not only directly conferred by Section 5, Article VIII., of the Constitution, but the General Assembly is expressly required and commanded to pass such a law."

In the case of Kansas City *ex rel.* v. Scarritt, 127 Mo. 642, the Court construing the words "and not otherwise" relating to the method of amending charters of cities organized under Section 16 of Article IX. of the Constitution, says, page 658: "We think the command in the organic law to the effect that the Charter of Kansas City shall be amended by the acts of her own people, **'and not otherwise,'** was written to be obeyed; and that it forbids the regulation and direction of purely municipal affairs in that city by act of the legislature. We believe that in authorizing Kansas City to frame a charter for its own government, the people of the State meant exactly what the Constitution says and nothing else. It is our duty to declare the meaning of the organic law in accordance with its intent as we understand it. We do not feel at liberty to strike the words 'and not otherwise' out of their place as a part of the city charter. In the connection in which these words appear (Article IX., Section 16) we consider them of mandatory force. We hold that they are binding upon all departments of the State government."

jected for the same offense to any greater or different punishment." (Caldwell v. Texas, 137 U. S. 691.)

Add after second line from top of page 74 this:

See also Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 238, where Mr. Justice Bradley, quoting Mr. Justice Field in Barbier v. Connolly, 113 U. S. 31, as to the scope of the Fourteenth Amendment, says that one of the rights covered by it is **"that in the administration of criminal justice no different or higher punishment should be imposed on one than is prescribed to all for a like offense."**

this State.

VI.

The Nesbit law unconstitutional because it contravenes the classification of Article VIII., Section 5, State Constitution.— Rules of Construction.

The Plaintiff in Error contended before the Supreme Court of the State that the Nesbit law was unconstitutional because it expressly contravenes the classification of Article VIII., Section 5, of the Constitution of the State.

The first section of the Nesbit law is as follows: "Section 1. In all cities of this State now having, or which hereafter may have, 300,000 inhabitants, or more, there shall be a registration of all the qualified voters, and said registration and the mode of conducting the elections held in such cities shall be governed and controlled as provided herein, and be subject to all the provisions of the other election laws of this State, so far as the same are not inconsistent or in conflict herewith." (Trans., p. 40).

Article VIII., Section 5, of the Constitution of Missouri reads as follows: "The General Assembly shall provide by law for the registration of all voters in cities and counties having a population of more than one hundred thousand inhabitants, and may provide for such registration

in cities having a population exceeding twenty-five thousand and not exceeding one hundred thousand, but not otherwise."

In the case of Ewing v. Hobli zelle, 85 Mo. 64, the Court, speaking of this Article VIII., Section 5, says, page 72: "This Section of the Constitution in so far as it relates to cities containing more than 100,000 inhabitants is imperative and mandatory, and the legislature could not refuse to obey the mandate without disregarding a plain duty." On page 73, the Court says: "The act in question we have seen provides for the registration of voters in cities having more than 100,000 inhabitants and the power to pass such a law is not only directly conferred by Section 5, Article VIII., of the Constitution, but the General Assembly is expressly required and commanded to pass such a law."

In the case of Kansas City *ex rel.* v. Scarritt, 127 Mo. 642, the Court construing the words "and not otherwise" relating to the method of amending charters of cities organized under Section 16 of Article IX. of the Constitution, says, page 658: "We think the command in the organic law to the effect that the Charter of Kansas City shall be amended by the acts of her own people, **'and not otherwise,'** was written to be obeyed; and that it forbids the regulation and direction of purely municipal affairs in that city by act of the legislature. We believe that in authorizing Kansas City to frame a charter for its own government, the people of the State meant exactly what the Constitution says and nothing else. It is our duty to declare the meaning of the organic law in accordance with its intent as we understand it. We do not feel at liberty to strike the words 'and not otherwise' out of their place as a part of the city charter. In the connection in which these words appear (Article IX., Section 16) we consider them of mandatory force. We hold that they are binding upon all departments of the State government."

The Plaintiff in Error contended before the Supreme Court of Missouri that Article VIII., Section 5, of the Constitution *ex proprio vigore*, and by construction of the Supreme Court, created a **constitutional classification** of cities and counties for registration purposes, and that the Nesbit law directly contravenes this classification. If that section is mandatory and all of its words "were written to be obeyed" and "are binding on all departments of the State government," as has been often held as to constitutional provisions, then it is clear that the people of the State of Missouri limited the power of the legislature to pass any registration laws except as provided in this section and created a constitutional classification for registration purposes: (1) of cities and counties having a population of more than 100,000 inhabitants, for which it **commands** the legislature to provide registration laws; (2) cities (not counties) having a population exceeding 25,000 and not exceeding 100,000, for which it **permits** the legislature to provide registration laws, and (3) the rest of the State, for which the legislature was neither commanded nor permitted to provide registration laws; and by adding the words "and not otherwise" the Constitution practically said the State is classified for registration purposes into three classes: (1) cities and counties over a 100,000 population, without regard to maximum limit, in which there must be registration; (2) cities over 25,000 and under 100,000 population, in which there may be registration, and (3) in the rest of the State, where there shall be no registration.

(a) The whole instrument is to be considered.

It is a rule of construction that in construing a written constitution the whole of the instrument is to be considered in determining the intent of each part.

Wilcox v. People, 90 Ill. 186;
Manley v. State, 7 Md. 135;
Lastro v. State, 3 Texas App. 363.

See also

Rasmussen v. Baker, 50 Pa. 819;
Endlich on Statutes, Sec. 533;
Cooley's Const. Lim., p. 78;
State v. Patterson, 98 N. C. 660;
Board of Com. v. Coler, 96 Fed. 284.

Construing this provision of the Constitution of Missouri in connection with Section 1, Article IV., which reads: "The legislative power, **subject to the limitations herein contained**, shall be vested in a Senate and House of Representatives to be styled the General Assembly of the State of Missouri," and in connection with Section 53 of Article IV. thereof, which reads: "The General Assembly shall not pass any local or special law (enumerating in 32 clauses subjects on which special and local laws were prohibited), among others, "for the opening and conducting of elections, or fixing or changing the places of voting," the section ending with the words, "In all other cases where a **general law** can be made applicable, no local or special law shall be enacted, and whether a **general law** could have been made applicable in any case is hereby declared to be a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject;" and in connection with Section 2 of Article IX. of the Constitution, classifying cities and towns, and in connection with the special provisions in regard to adopting charters for large cities, Sections 16 and 17, Article IX. and Sections 20, 21, 22 and 23 of Article IX. it is perfectly evident that the people of the State of Missouri meant, in adopting that Constitution, that no special law could be passed for registration purposes for any particular city of the State; but that, on the contrary, general laws should be passed in reference to the respective classes mentioned in Article VIII. of Section 5. It was never intended that under the guise of a different classification as to population, laws might be passed for one city in the State by making

the number of inhabitants large enough to embrace only the City of St. Louis.

We are aware that the Supreme Court of Missouri has held that the Legislature might legislate on matters involving the relation of the City of St. Louis to the State, even directly by name, and that it had upheld classification in matters of general interest to the State on a basis of 200,000 or 300,000 population, by making the provision that all such laws should embrace all cities having, "**or which may hereafter have,**" the required population; but in those instances there was no specific constitutional classification—no limitation of power. The Legislature can exercise general powers except where the limitations of its powers are expressed or implied in the Constitution of the State or the United States, but when the limitation is expressed it must halt. Where the people fix the limits their servants must not transgress them. This is in accordance with the general principles of construction.

(*b*) *An affirmative enactment implies a negative of what is not included or different.*

An affirmative enactment of a new rule implies a negative of whatever is not included or is different; and if, by the language used, a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise.

Sutherland on Stat. Const., Sec. 14;
Wells v. Supervisors, 102 U. S. 635;
Chandler v. Horn, 83 Ala. 390;
Ex parte Joffee, 46 Mo. App. 360.

Another rule of construction is, that when the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition or to extend the penalty to other cases.

Cooley Const. Lim., pp. 78-79;
Thomas v. Owens, 4 Md. 189;
Matter of Dorsey, 7 Port. 293;
Rison v. Farr, 24 Ark. 161;
People v. Ramond, 37 N. Y. 428;
People v. Sibertson, 55 N. Y. 50;
State v. Goldstocker, 40 Wis. 124;
People v. McKinney, 52 N. Y. 374.

(c) *Directions given as to time or mode of proceeding must be followed.*

If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end.

Cooley Const. Lim., p. 94;
Varney v. Justice, 86 Ky. 596;
State v. Johnston, 26 Ark. 281;
Wolcott v. Wigton, 7 Ind. 44;
Conner v. Mathes, 8 Heisk. 504;
Life Assn. v. Board Assessors, 49 Mo. 512;
State v. Duncan, 28 Wis. 541.

The modes prescribed for the exercise of the granted powers cannot be severed from the substantive things authorized to be done. The manner directed is the means —the appointed action—through which alone the power is effective for the substantive objects intended to be accomplished. The legislature must be constituted, sit at the time and place, and proceed in the methods directed by its creator; otherwise it is not clothed with, nor exercising, the sovereign, legislative power.

Sutherland on Stat. Const., Sec. 66;
Sutherland on Stat. Const., Sec. 454 and notes;
Page v. Allen, 58 Pa. St., 238.

(*d*) *General terms are limited by particular recitals.*

It has been held in Missouri that it is a general rule of construction applicable to all writings, constitutions, statutes, contracts, and charters, public or private, and even to ordinary conversations, that general and unlimited terms are restrained and limited by particular recitals, when used in connection with them.

Miller v. Wagenhauser, 18 Mo. App. 14;
Grumley v. Webb, 44 Mo. 444;
Dart v. Bagley, 110 Mo. 42;
Hall v. Schoenecke, 128 Mo. 661.

And further that "Effect should be given in construing statutes to provisions which are express, in preference to those which are general in their terms."

Roth v. Gabbert, 123 Mo. 21.

(*e*) *Words of constitutions should never be regarded as directory.*

The words of the Constitution are never to be regarded as directory merely. If directions are given as to the manner of exercising a power, it was intended that the power should be exercised in the manner directed, and in no other manner; no unessential matters were intended to be embraced in the Constitution.

Varney v. Justice, 86 Ky. 596;
People v. Dettenthaler, 77 N. W. Rep. 450.

(*f*) *Expression of one thing excludes others.*

The expression of one thing in the Constitution is necessarily the exclusion of things not expressed.

Page v. Allen, 58 Pa. St. 338;
Hall v. Shoenecke, 128 Mo. 661, 668;
State *ex rel.* v. Foster, 119 Mo. 344;
Denman v. Broderick, 111 Cal. 46.

25612

In this last named case, the Supreme Court of California, construing a registration law applicable only to certain cities, and under a Constitution much like ours, says: "The act is an improper attempt by the act itself to create a class of municipal corporations for a special purpose, without reference to the existing classifications by general law, and is local and special legislation, in conflict with the Constitution."

The action was by mandamus against the Auditor. It was claimed that the Auditor, as such, had no interest in the question which would enable him to raise the question as to the constitutionality of the act. The Court held that "the act under which petitioner claims being unconstitutional, there is no law authorizing the Auditor to draw the warrant, and to do the act demanded of him would be to violate his official duty and oath and subject himself to liabilities and penalties."

VII.

The Classification by State Court is unreasonable and arbitrary.

If these principles of construction govern, on what theory can the legislature make a classification of 100,000 population in Kansas City and St. Joseph and 300,000 population in St. Louis for registration purposes? If it could decide on 300,000 it can on 150,000 or 500,000. If it could make one new class it could make twenty or one hundred classes, and by adding the magic words **"or which may hereafter have;"** it could have a different registration law for every city over 25,000 in this State and in every county and city over 100,000 by simply dividing on the population such cities and counties might respectively have. In other words, under the guise of general laws, one hundred or more special registration laws might exist and the idea of uniformity and general laws become obsolete.

Judge Sherwood, the learned Judge who wrote the opinion in the case at bar, in his dissenting opinion in

State *ex rel.* v. Pond, 93 Mo. 606, says on page 687: "As heretofore mentioned, our Constitution wisely provides for the enactment of general laws; commands that they be enacted wherever they can be made applicable; makes this a judicial question and refuses to trust it to the judgment of the legislature. Not satisfied with this, that instrument abounds with other similar restrictions forbidding all evasions of its stringent prohibitions; among others that of cutting down a general law by its partial repeal, and thus transforming it into a 'special local law.'"

In State *ex rel.* v. Miller, 100 Mo. 439, the Court has said: "Since there is a growing disposition to evade the prohibitions against special laws, we repeat that peculiarities and differences which will serve to distinguish persons or things as a class for many purposes **do not necessarily furnish any basis whatever for a legislative classification.** To justify such legislation the distinguishing features must be such as to call for and **demand a separate rule of statute law.**"

In the same case, the Court says, page 448: "To make such a law general there must be some distinguishing peculiarity which gives rise to a necessity for the law as to **the designated class.** A mere classification for the purpose of legislation without regard to such necessity is simply special legislation of the most pernicious character and is condemned by the Constitution. Mere differences which would serve for a basis of classification for some purposes amount to nothing in a classification for legislative purposes, unless such differences are of a character as, in **the nature of things,** to call for and demand separate laws and regulations." But in the case at bar this Court, while citing this very case of State v. Miller (which, by the way, is incorrectly designated at page 159 of Transcript as in 140 Mo. 439, instead of 100 Mo. 439) as authority, sustains the Nesbit law as a Constitutional enactment.

It would be difficult to give a reason why laws for cities and counties of over 100,000 inhabitants as to registration

25613

of voters should not be uniform and general as the Constitution requires.

Prior to 1883, the Charter of St. Louis, adopted by the people under the sanction of the Constitution, provided for registration.

In 1883 this was changed and a general registration act was passed by the General Assembly following the limitations of Article VIII., Section 5, of the Missouri Constitution and the classification was made on 100,000 inhabitants and over. St. Louis then had over 300,000 inhabitants. In 1895 another general registration act was passed, again classifying as required by said section of the Constitution on 100,000 inhabitants and over. St. Louis then had over 300,000 inhabitants. No reasonable ground for a different classification in 1899 exists—none can be given except the arbitrary will of a partisan legislature.

It has been further held that the classification of cities for purposes of legislation cannot be sustained unless the act relates to the exercise of a corporate power of such cities or to the number, character, powers and duties of a municipal officer thereof as to some subject under the control of the city government.

Safe Dep., etc., Co. v. Fricke, 152 Pa. St. 231;
Ayars App. 122 Pa. St. 281;
In Ruan St. 132 Pa. St. 273;
Commonwealth v. Patton, 85 Pa. St. 258;
Lloyd v. Smith, 176 Pa. St. 213.

This doctrine has been recognized by the Supreme Court of Missouri to the fullest extent—and new classifications are discountenanced when they are obviously intended to result in special legislation.

In the case of Murnane v. City of St. Louis, 123 Mo. 479, it was held that the formation of a new class of cities, within the first class, for strictly municipal objects, is in violation of that section of the Constitution which limits the number of such classes to four, and declares that "the

power of each class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions." Const., Art. IX. Sec. 7.

In the same case it was held that the language of the act, applying it to city charters then existing, was in conflict with the constitutional command against special legislation of that sort. See also State *ex rel.* v. Hermann, 75 Mo. 340; State *ex rel.* v. County Court, 89 Mo. 237, and other cases cited by the Court in the Murnane case on page 495, the Court saying: "We hence conclude that the act is special in its operation and effect. We think it was obviously so intended, and that the intent has not been sufficiently concealed to prevent its disclosure. That intent crops out in the part of the act already indicated; but, thus exhibited, the intent pervades the whole enactment; and stamps it as a fatal deviation from the fundamental law."

In the case of St. Louis v. Dorr, 145 Mo. 466, 475, the Supreme Court of Missouri says: "Conceding then (for argument) that the boulevard act before us is in form a general law (because it may apply to all cities that in future reach the prescribed size) it is yet unconstitutional because it would add another class to the four classes of legislative charters already existing and would confer on some cities of the first class (on reaching the population of 300,000) municipal powers not possessed by smaller cities of the same class. Worcester, etc., Bank v. Cheney, 94 Ill. 430; Denman v. Broderick, 111 Cal. 96; Bloss v. Lewis, 109 Cal. 493."

The learned Judge writing the opinion in the case at bar recognized that the Murnane case, 123 Mo. 479, was directly in conflict with his view, and said it was no longer authority. The majority of the court did not agree to this, three of the Justices only, Sherwood, Marshall and Burgess, concurred in this view, and three, Gantt, Brace and Valliant, concurred in all except the remarks as to the

scope of the Murnane case, and one, Robinson, not expressing any opinion in the case.

In the opinion of the Supreme Court of the State in this case (Trans., page 159) it is said that "respondent also asserts that House Bill No. 760 violates the following clauses of Section 53 of Article IV of the Constitution 'because it is a local or special law; (2) regulating the affairs of counties, cities, etc.; (11) for the opening and conducting of elections, or fixing or changing the places of voting; (14) creating offices and prescribing the powers and duties of officers in counties, cities, townships, election or school districts; (32) forbidding the passage of a local or special law when general laws can be made applicable, and making it a judicial question, etc. All of these objections are answered by the adjudications in Kansas City v. Stegmiller (151 Mo. 189) and State *ex rel.* Hawes v. Mason (153 Mo. 23) that St. Louis stands alone, and that a law designating that city by name would be valid and a general law."

We contend that in so deciding, and in placing this interpretation upon the Constitution of the State in this case, following the Stegmiller and the Hawes cases, the Supreme Court of the State has either misconstrued the Constitution of the State and deprived the citizens of St. Louis of the equal protection of that instrument, or that if the Constitution is susceptible of the interpretation so placed upon it by the Supreme Court, then we contend that that Constitution itself is in conflict with the first section of the Fourteenth Amendment to the Constitution of the United States, in that it denies to citizens of St. Louis the protection that it gives to citizens of all other parts of the State against special legislation. The first section of Article IV of the Constitution expressly provides, in vesting in the General Assembly of the State of Missouri the legislative power of the State, that such legislative power is "subject to the limitations herein contained." Section 53 of the same article in plain language,

admitting of no doubt as to its mandatory character, prohibits the General Assembly from passing any local or special law; (2) "regulating the affairs of counties, cities, townships or school districts; (12) for the opening and conducting of elections or fixing or changing the places of voting." And in the thirty-second subdivision of that section it is ordained that "in all other cases where a general law can be made applicable, no local or special law shall be enacted, and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject."

When we refer to Article IX of the same Constitution, we find that Section 7 directs the General Assembly to provide by *general* law for the organization and classification of cities and towns; that Section 16, which authorizes cities having a population of more than one hundred thousand inhabitants to frame a charter for its own government, ordains that said charter shall be consistent with and subject to the Constitution and laws of the State, and that said charter so adopted may be amended by a vote of three-fifths of the qualified voters of such city "voting at a general or special election, **and not otherwise;** but such charter shall always be in harmony with and subject to the Constitution and laws of the State."

When we examine Section 20 of the same Article, relating to the City of St. Louis and authorizing it to frame a charter for its government, it is provided that such charter shall be in harmony with and subject to the Constitution and laws of Missouri; that it may be amended at intervals of not less than two years on the vote of three-fifths of its qualified voters (Section 22), and that Section 23 ordains that such charter and amendments shall always be in harmony with and subject to the Constitution and the laws of Missouri; that the city as organized under it, shall perform all functions in relation to the State "in the

25615

same manner as if it were a county as in this Constitution defined," and Section 25 provides that "notwithstanding the provision of this Article, the General Assembly shall have the same power over the City and County of St. Louis that it has over other cities and counties of this State."

In depriving the City of St. Louis of the protection of these constitutional limitations on the power of the General Assembly, as the Supreme Court of the State has done in this case, we contend that the citizens of that city are deprived of the equal protection of the laws.

It is difficult to conceive or imagine or invent language that would more carefully provide and command that not only the City of St. Louis is not subject to special legislation, but it is explicitly and distinctly placed upon the same basis as all other cities and counties of the State, as to which there can be no question whatever that the Constitution plainly and emphatically provides and ordains that they must be governed by general laws applicable to all the cities and counties of the State. The only exception to this is contained in Section 7 of this Article IX, which authorizes a classification of the cities of the State, and requires the power of each class to be defined by general law, so that all municipal corporations of the same class shall possess the same privileges and be subject to the same restrictions. This section has been construed over and over again by the State Supreme Court as giving the General Assembly power to legislate for these cities by classes **for municipal purposes only.**

The most recent case in Missouri on this point is Owen v. Baer, not yet officially reported, but in 55 Southwest Reporter, 644. The opinion in this case was announced and filed February 29, 1900, after we had argued and submitted the case at bar, but before the decision in it had been announced. It is somewhat curious to note that while the present Constitution of Missouri has been in force for 25 years, the Supreme Court of the State has not yet

settled upon a construction of Article IX., Section 7, which has met with the support of the whole Court. In the dissenting opinion of Judge Marshall, in the Owen v. Baer case, he has, at page 656 of the Reporter, collated the decisions on this section into eleven (11) groups, of which he says that three of them, embracing some of the most important and recent of them, are no longer the law—while Gantt, Chief Justice, speaking apparently for a majority of the Court, refuses to accept Judge Marshall's construction or interpretation of the cases.

In the opinion of the Chief Justice, and which seems to be that of a majority of the Court, it is said (p. 645): "The purpose of classification would be nullified if the Legislature would take one city out of its class and indue it with powers not granted to all the others. The object to be attained by Section 7 of Article IX. of the Constitution was well understood when the people adopted that instrument as the organic law of the State. In a word it was to produce uniformity in the municipal charters of the State * * *."

Without the express provision of Section 7, Article IX., who can doubt that all courts would hold that the other provisions of the Constitution forbid legislation by classes even for cities? All cities would have to be legislated for and reached by a general law. When the Constitution provides that the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this State, as is done in Section 25 of this Article IX., it surely cannot mean that it shall have more power over that city than it has over any other city or county of the State. Yet this is the construction practically placed upon the Constitution by the Supreme Court of the State in the case at bar, and in so construing our State Constitution we urge and contend that that Court either violates the First Section of the Fourteenth Amendment to the Constitution of the United

25616

States and deprives the City of St. Louis of the equal protection guaranteed by that Constitution, or if the interpretation placed upon that Constitution by the State Supreme Court is correct, then the Constitution itself denies to the citizens of St. Louis that equal protection to which, under the Fourteenth Amendment of the Constitution of the United States, they are entitled.

VIII.

This arbitrary classification is contrary to the Fourteenth Amendment.

Not only did the Court, by its opinion in the case at bar, violate both the provisions of the Constitution of Missouri prohibiting the enactment of special laws and requiring the passage of general laws, and also Section 5 of Article VIII. of the Constitution, and in so doing take from the citizens of St. Louis the protection against special legislation which the Constitution of the State, if equal in its operations over all, gave them, but it also created, in order to protect the Nesbit law, a new, unnecessary, arbitrary and unreasonable classification as to registration, and in so doing deprived the citizens of the United States residing in St. Louis of their privileges and immunities, as we have heretofore shown, and particularly of the equal protection of those provisions of the Constitution of the State which, under the opinion of the Supreme Court in this case, are accorded to the citizens of the United States residing in the other cities of the State having over 100,000 inhabitants, to-wit, Kansas City and St. Joseph.

We contend that this is directly in the teeth of the Fourteenth Amendment to the Constitution of the United States, as construed by this Honorable Court.

In the case of Gulf, etc., Co. v. Ellis, 165 U. S. 150, this court construed an act of the Legislature of the State of

Texas providing for the payment of attorneys' fees in claims against railroads not exceeding $50 for stock killed, etc., if plaintiff should finally establish his claim. Plaintiff recovered damages for the killing of a colt and for the $10 attorney fee. The case was appealed through the District Court and Court of Civil Appeals to the Supreme Court of the State, which affirmed the judgment. A writ of error was sued out to reverse this judgment. In discussing the case, this Court, through Mr. Justice Brewer, on page 155, says: "But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing cases), yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

"As well said by Black, J., in State v. Loomis, 115 Mo. 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employes any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void: 'Classifi-

25617

cation for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes, furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

After citing with approval Vanzant v. Waddel, 2 Yerger 260; Dibrell v. Morris' Heirs, 15 S. W. Rep. 87; and Bell's Gap, etc., Co. v. Pennsylvania, 134 U. S. 232, and discussing the same, the learned Justice further says, page 159: "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this Court, in Yick Wo v. Hopkins, 118 U. S. 356: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law,

or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.'"

Again, after discussing numerous decisions involving the question of classification, the Court says, page 165: "It is apparent that the mere classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, **and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.** Tested by these principles the statute in controversy cannot be sustained. The judgment of the Supreme Court of Texas is, therefore, reversed, and the case is remanded for further proceedings not inconsistent with this opinion."

In the case of Atchison, etc., Co. v. Matthews, 174 U. S. 96, this Court, discussing a statute of Kansas providing for an attorney's fee to become a part of the judgment where a party recovers against a railroad for damages by fire, through Mr. Justice Brewer, distinguished the Ellis case and held the statute constitutional, saying, page 104: "It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power. On the other hand, it is also true that

25618

the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. **Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."**

Mr. Justice Harlan, Mr. Justice Brown, Mr. Justice Peckham and Mr. Justice McKenna, dissented from this opinion, in which dissent occurs this language, page 123: "Undoubtedly, the State may prescribe new duties for a railroad corporation and impose penalties for their non-performance. But, under the guise of exerting its police powers, the State may not prevent access to the courts by all litigants upon equal terms. It may not, to repeat the language of the Court in the Ellis case, 'arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency.' Arbitrary selection cannot, we said in the same case, 'be justified by calling it classification.' **There is no classification here except one that denies the equal protection of the laws.** It would seem that what was said in the Ellis case was exactly in point, namely, 'as no duty is imposed, there can be no penalty for non-performance.' Instead of prescribing some penalty for the neglect by the railroad company of duties specifically enjoined upon it, the State attempts, and by the decision just rendered, is enabled—

to take from the company the right which we declared in the Ellis case was secured by the Constitution, namely, the right to 'appeal to the courts as other litigants, under like conditions, and with like protection.' * * * If there is one place under our system of government where all should be in a position to have equal and exact justice done to them, it is a court of justice—a principle which I had supposed was as old as Magna Charta." So, that on the point here urged, all the menbers of the Court were agreed.

In the case of Maxwell v. Dow, 176 U. S. 581, this Court, through Mr. Justice Peckham, cites with approval Caldwell v. Texas, 137 U. S. 692, which held that no State can deprive particular persons or classes of persons of equal and impartial justice under the law without violating the Fourteenth Amendment to the Constitution and the due process of law within the meaning of the Constitution is secured when the laws operate on all alike and no one is subjected to partial or arbitrary exercise of the powers of the government. He also cites with approval, Leeper v. Texas, 139 U. S. 462, 467, which said, "that by the Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or class of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice." See also McGowan v. Illinois Trust, etc., Co. 170 U. S. 283, 294.

In the case of Johnson v. Goodyear Mining Co., 47 L. R. A. 338, the Supreme Court of California discusses this question of classification at length, stating on page 343: "It

is claimed that corporations are a class, and that classifications can be made, and that a law is not unconstitutional if it affects all of a class. **While this is true, yet the classification must be founded upon differences either defined by the Constitution or natural, or which will suggest a reason which might naturally be held to justify the diversity of legislation.** Darcy v. San Jose, 104 Cal. 645; State *ex rel.* v. Hammer, 42 N. J. L. 439; Cooley Const. Lim., 6th Ed., page 484. Arbitrary selection can never be justified by calling it classification. Gulf, etc., Co. v. Ellis, 165 U. S. 159."

This case, page 345, quotes with approval the opinion in Louisville, etc., Co. v. Railroad Commission, 19 Fed. Rep. 679, in which the Circuit Court of the United States held unconstitutional an act of the legislature of the State of Tennessee creating a railroad commission, and making certain discriminations against railroads. In the opinion it is said: "Their general object (referring to the provisions of the Fourteenth Amendment) is to secure to all citizens in like circumstances an equality of legal rights, and to protect minorities and other interests not strong enough to protect themselves against the aggressions of the majority, to restrain all injurious legislative discrimination against persons and property; to compel an equal distribution of the burdens of government upon every citizen, natural or corporate, coming fairly within the purview of the law; and to give to every one an equal right to invoke the remedies prescribed by law for redress of wrongs done either to his person, reputation, or property."

The case of Missouri v. Lewis, 101 U. S. 22, which is relied on by the Supreme Court of the State, and cited against us, is not, as we understand it, in conflict with these views. In it, this Court, through Mr. Justice Bradley, discussed the general objects and purposes of the Fourteenth Amendment, saying, on page 30: "These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the States from

abridging their privileges or immunities, and from depriving any person of life, liberty, or property without due process of law, and from denying to any persons within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The amendment could never have been intended to prevent the State from arranging and parceling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in view or could have been included in the prohibition that 'no State shall deny to any person within its jurisdiction the equal protection of the laws.' It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject matter, and amount and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States **and does not abridge the privileges and immunities of citizens of the United States and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate court for relief.**"

We respectfully submit that there are general expressions in the opinion as to the power of the State to legislate for different parts of the Commonwealth, that were scarcely necessary to the decision of that case, and that have been modified by subsequent cases hereinbefore cited, particularly those wherein this Court denounces artificial and unreasonable classification. But it will be observed that one of the restrictions specially mentioned by Mr. Justice Bradley, as coming within the prohibition of the Fourteenth Amendment is, **'including the equal right to resort to the appropriate court for redress.'** We maintain that

this equal right, along with others herein pointed out, is positively and unequivocally denied to the citizens of St. Louis, while it is granted to the citizens of Kansas City and St. Joseph, although all three of said cities come within the same constitutional class, that is, have over 100,000 inhabitants.

In view of this long array of authorities, we confidently insist that the Nesbit law and the opinion of the Supreme Court of the State in this case sustaining it, amounts to a denial of the equal protection of the laws of the State to the people of the City of St. Louis and that it should be reversed.

BEN. SCHNURMACHER,
City Counselor.

JOHN W. NOBLE,
GEO. H. SHIELDS,
GEO. D. REYNOLDS.
Of Counsel, for Plaintiff in Error.